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REDACTED—FOR PUBLIC INSPECTION

December 11, 2020

By ECFS

Marlene Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554
Attn: Media Bureau

Re: **Program Carriage Complaint, *Fuse, LLC and FM Networks, LLC v. AT&T Inc., DIRECTV, LLC, and AT&T Services, Inc., File No. CSR-____-P***

Dear Ms. Dortch:

Fuse, LLC and FM Networks, LLC (together, “Fuse Media”) submit the enclosed public redacted version of its Program Carriage Complaint dated December 11, 2020. Fuse Media has denoted with [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] where it has redacted Confidential Information. A confidential version of this filing is being simultaneously filed with the Commission.

Please contact me with any questions.

Respectfully submitted,

/s/
Pantelis Michalopoulos
Counsel to Fuse, LLC and FM Networks, LLC

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
FUSE, LLC,)	File No. CSR-____-P
and)	
FM NETWORKS, LLC,)	
Complainants,)	
)	
v.)	
)	
AT&T INC.,)	
DIRECTV, LLC)	
and)	
AT&T SERVICES, INC.,)	
Defendants.)	

TO: Chief, Media Bureau

PROGRAM CARRIAGE COMPLAINT

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December 11, 2020

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FUSE, LLC,)	File No. CSR-____-P
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FM NETWORKS, LLC,)	
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v.)	PROGRAM CARRIAGE
)	COMPLAINT
AT&T INC.,)	
DIRECTV, LLC)	
and)	
AT&T SERVICES, INC.,)	
Defendants.)	

TO: Chief, Media Bureau

PROGRAM CARRIAGE COMPLAINT

I. INTRODUCTION AND SUMMARY

1. AT&T Inc. (together with DIRECTV, LLC and AT&T Services, Inc., “AT&T”) has discriminated against the Fuse network and in favor of its own similarly situated affiliated programming, making Fuse an offer that is a mockery—[[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]]

Two years ago, Fuse was dropped by a vertically integrated distributor, Comcast, receiving notice from Comcast the day after a consent decree restricting Comcast’s behavior toward independent programmers had expired on September 1, 2018. Comcast’s termination of Fuse was the principal factor leading to Fuse’s bankruptcy in early 2019. Now Fuse is faced with the same existential threat, now in the hands of the other major vertically integrated distributor. The elimination of an independent programmer in favor of that distributor’s programming affiliates would not only be a bad thing; it is the precise bad thing Congress meant to prevent. And it

would be especially harmful here, as it would eliminate a vibrant voice speaking to, and for, the multiethnic, multicultural community, especially Latinos, Afro-Latinos, and African Americans. AT&T's conduct would also eliminate the only remaining Latino-owned and managed cable network. It would destroy a programmer whose recent buyout by its own Latino management has just been saluted with enthusiasm and pride by such luminaries as Congressional Hispanic Caucus Chairman Joaquin Castro and Congresswomen Nydia Velázquez.¹

2. The program carriage rules were enacted by Congress in 1992. After hearing testimony from independent programmers, Congress had concluded back then that “[t]he cable industry has become vertically integrated As a result, cable operators have the incentive and ability to favor their affiliated programmers.”² These rules’ prohibition on discrimination against independent programmers has become even more important now than it was then. The reason is the emergence of two vertically integrated distributors, with almost half of the national households and dozens of networks between them. One of these two distributors, AT&T, has acted on its natural incentive to favor its own programming and discriminate against the similarly

¹ Hispanic Caucus (@HispanicCaucus), Twitter (Dec. 10, 2020, 2:20 PM), <https://twitter.com/HispanicCaucus/status/1337114879807922176> (“Minority-owned businesses are more crucial than ever, especially in the media industry. Congratulations to Fuse Media on transitioning from Latino-led to Latino-owned! We need more Latino leaders in Hollywood.”); Jon Lafayette, *Latino Management Group Buys Control of Fuse Media*, NextTV (Nov. 19, 2020), <https://www.nexttv.com/news/latino-management-group-buys-control-of-fuse-media> (“‘In a complex and diverse society, media plays an important role in amplifying authentic storytelling and Fuse Media does the work to ensure Latino representation in front of and behind the camera,’ said Congresswoman Nydia M. Velázquez (D-NY), chair of the House Small Business Committee. ‘I’d like to congratulate them on their transition from Latino-led to Latino owned. Minority-owned businesses like Fuse Media are the heartbeat of our nation and the backbone of our economy[.]’”).

² Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102–385 §2(a)(5), 106 Stat. (1992).

3. That behavior is a stark departure from AT&T's conduct toward Fuse Media before AT&T became vertically integrated. For over 15 years, the relationship between AT&T and Fuse Media was characterized by good-faith negotiations and mutually-beneficial carriage arrangements. This has changed after 2018, when AT&T acquired Time Warner Media and its panoply of networks, including TBS, TNT, HBO, CNN, Cartoon Network, Adult Swim, and TruTV. Once a constructive partner, AT&T is now behaving as if Fuse Media does not even exist. The carriage agreement between the two companies is set to expire on [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] For months, AT&T has all but ignored Fuse Media's proposals and entreaties to get serious about renewal discussions. Only after Fuse Media was forced to notify AT&T it might have to resort to the Commission did AT&T make an offer. But the offer was untenable and likely unserious: [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] That is not how AT&T treats its affiliated programmers. And termination of carriage on AT&T does indeed threaten Fuse Media's very existence—its ability to continue as an independent programmer, providing unique and diverse content to underserved demographics, no less than [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]]

4. Fuse’s diverse, multiethnic, and multicultural programming is now carried on DIRECTV, U-Verse, AT&T TV, and AT&T TV Now. The terms of carriage are set forth in an agreement dating back to 2006, with the most recent amendment in June 2016, before AT&T acquired Time Warner. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[[END CONFIDENTIAL]] The agreement is set to expire on [[BEGIN CONFIDENTIAL]]

[REDACTED] [[END CONFIDENTIAL]]

5. Fuse Media has been trying fervently to negotiate its renewal for the last four months, and made a concrete and detailed proposal to AT&T. For almost four months, AT&T did not counter, and its response consisted largely of resounding silence. Fuse has created a timeline of all communications between the two companies, and supplies as attachments to this complaint all email exchanges under a request for confidential treatment. What this evidence shows is an impossible and frustrating one-person tango. “Communications between the two companies” is in fact a euphemism. Until AT&T’s travesty of an offer, the entire record of these communications consisted of overtures, pleas, and detailed proposals by Fuse Media and either logistical one-liners [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] or total silence by AT&T.

6. Throughout this near-monologue, AT&T expressed no opinions, objections, or concerns whatsoever with respect to the key price, packaging, and distribution provisions proposed by Fuse Media. This silence forced Fuse Media to send AT&T the required 10-day notice under the Commission’s program carriage rules. While the notice got AT&T’s attention

and finally elicited action, the action was desultory—[[BEGIN CONFIDENTIAL]] [REDACTED]
[REDACTED] [[END CONFIDENTIAL]]

7. This is precisely the behavior the program carriage rules are intended to curb. The programming of Fuse is similarly situated to that of multiple Turner Broadcasting Service (“Turner”) networks affiliated with AT&T—with shows belonging to the same genres, often written by the same people and speaking to the same audiences, with the shows aired by AT&T’s affiliated networks often emulating those on Fuse in their quirky and narrow subject matter, and with one trying to steal the other’s audience. Fuse features entertainment and lifestyle programming comprising numerous genres, including movies, scripted series, reality, documentaries, and current events, with a heavy emphasis on sitcoms, which account for 45 percent of its content. The programming lineup of AT&T’s TBS? Movies, scripted series, reality, documentaries, and current events, with a heavy emphasis on sitcoms, which account for 65 percent of its content. And Adult Swim shares with Fuse content that is unique to these two networks. They both offer a genre that is very uncommon in the cable programming industry today—adult animation—including programming in the 15-minute live-action sitcom format, which is virtually unique to these two networks. TruTV also competes with Fuse, an innovative reality show programmer, both for reality television audiences and for content. In fact, in one case, TruTV has been able to win rights to content previously aired by Fuse. Fuse caters to a diverse, multiethnic, and multicultural audience that is younger than the median age of cable viewers. TBS seeks to target that audience, too. Among other demographics, Fuse is especially focused on Latinos in general, and Latinos who consume their media in English in particular, as well as Afro-Latino and African-American audiences. The Turner networks also aspire to connect with these important, numerous, and underserved demographics.

8. To speak to the same people, one often needs the same voice and creator. It is thus no wonder that the creators of Fuse’s animated series Sugar & Toys have been behind no fewer than six shows on Adult Swim and TBS. Nor is it a surprise that TruTV and TBS have been in lockstep with Fuse in airing quirky shows about food and NBA basketball players—TruTV’s recently announced “Fast Foodies” following Fuse’s “Fluffy’s Food Adventures,” “Made From Scratch,” and “Struggle Gourmet,” and TruTV’s just-announced “Double Cross with Blake Griffin” and TNT’s “Shaq Life” in the footsteps of Fuse’s “WTF Baron Davis.” This is not just the same genre; it is the same micro-sub-genre.

9. In fact, there can probably be no stronger evidence of similarly situated status than proof that one programmer tries directly to appeal to the audiences of the other: this is the case here. AT&T affiliated networks TBS, TNT, CNN, TruTV, and Adult Swim have [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

10. The ratings of Fuse are also comparable to those of the AT&T networks when adjusted on the basis of each network’s reach and fees. Fuse has calculated each network’s cost per rating point, based on Kagan data on fees and Nielsen data on ratings. Even though Nielsen undercounts independent networks’ audiences, the conclusion is stark: Fuse’s cost per rating unit is comparable to at least some of the Turner networks measured on total audience ratings as well as ratings on the two key demographics—“2 plus” member households and 18-49 year olds. Fuse’s expert witness—veteran programming negotiator, Mr. Steven Sklar— has confirmed the reasonableness of these calculations and conclusions.³

³ Declaration of Steven Sklar ¶ 26, attached as Exhibit 19 (“Sklar Decl.”).

11. Correspondingly, Fuse and the AT&T networks offer a similar proposition and demographics to advertisers. And the similarities do not end there. Fuse competes vigorously with CNN for documentary programming, which is featured on both networks. In the increasingly competitive fight among networks for awards, including the prestigious Peabody and EMMY awards, Fuse competes head-to-head against CNN and HBO with its social justice-focused documentaries, receiving in just three years as many as 25 diversity award nominations alongside those of CNN and/or HBO, and winning six awards (including one Peabody and one Daytime Emmy).

12. The similarly situated nature of Fuse and AT&T's programming and networks is confirmed by Fuse Media's expert witnesses: Mr. Sklar, and prominent economists Dr. Coleman Bazelon and Mr. William P. Zarakas (collectively, the Brattle Group).⁴ The Brattle Group points to additional evidence that the programming is similarly situated: that is the only explanation for the change in AT&T's treatment of Fuse after the acquisition of Time Warner.⁵ It is AT&T's ownership of similar programming that permits AT&T to have its cake and eat it too: drop Fuse, avoid paying Fuse Media any fees, mitigate the audience loss by diverting Fuse's audience to the AT&T-affiliated programs, and keep the increased advertising revenue that comes with these greater audiences. This would be a quadruple win for AT&T, but a loss for viewers and the public.

13. AT&T's apparent refusal to accept Fuse's price and penetration terms discriminates against Fuse and in favor of the similarly situated content provided by AT&T affiliates TBS, TNT, Adult Swim, CNN, and TruTV. Specifically, on information and belief,

⁴ *Id.* ¶ 2; Declaration of Coleman Bazelon and William P. Zarakas ¶ 6, attached as Exhibit 20 ("Brattle Group Decl.").

⁵ Brattle Group Decl. ¶ 21.

AT&T's networks TBS, TNT, Adult Swim, CNN, and TruTV are paid higher rates than Fuse is paid today, both on an absolute and on a ratings-adjusted basis. [[BEGIN CONFIDENTIAL]]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] In addition, all of the AT&T affiliated networks enjoy greater distribution on AT&T's platforms than Fuse is receiving today and than AT&T is offering. For example, TBS, TNT, CNN, Adult Swim, and TruTV are also carried on all four of DIRECTV's English-language packages, and all or some of the four Spanish-language packages. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

14. From humble beginnings, Fuse has risen to become a star in the firmament of multiethnic, multicultural programming. AT&T's actions would not only harm Fuse and restrain its ability to compete fairly with TBS, TNT, CNN, Adult Swim, and TruTV; they would likely result in catastrophic harm that threatens Fuse Media's continuing existence. Fuse Media has now largely recovered from the blow dealt by Comcast, has emerged successfully from reorganization, has once again become a competitive threat, and is well on its way to full recovery. But the behavior of AT&T, the other major vertically integrated distributor, threatens once again Fuse Media's existence. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]] No independent programmer can withstand such a severe loss. The harms to Fuse Media would likely include [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] The discontinuance of carriage on AT&T would annihilate Fuse and extinguish for good the still burning flame of an important player in the space.

15. While AT&T's motives are not a necessary element of Fuse Media's discrimination case, Fuse Media believes that its likely destruction is not only the result of AT&T's actions, but may also be the intent informing these actions. [[BEGIN

CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

16. This is an action seeking relief for violations by AT&T of the non-discrimination requirement that Congress directed the Commission to impose on MVPDs in Section 616 of the Communications Act of 1934, as amended,⁶ and that the Commission duly imposed in its implementing regulations.⁷ Fuse Media believes that this complaint supplies the Bureau with ample information to allow the Bureau to make a *prima facie* determination of discrimination, and to proceed to the merits stage of the proceeding, including discovery pertaining to any

⁶ 47 U.S.C. § 536.

⁷ 47 C.F.R. §§ 76.1300-76.1302 ("Program Carriage Rules").

business reasons to support the rejection of Fuse Media’s carriage renewal proposal, as well as the failure to engage in negotiations of business terms that could lead to such renewal.

II. PARTIES

A. FUSE MEDIA

17. Fuse Media is a video programming vendor (“VPV”) as defined in Section 616 of the Communications Act: an entity “engaged in the production, creation, or wholesale distribution of video programming for sale.”⁸

18. Fuse Media is a Latino-owned, cross-platform entertainment media brand that creates empowering, multi-cultural content and experiences for a multiethnic millennial and GenZ audience.⁹ Fuse Media is independently owned and operated. In fact, in mid-November 2020, a Latino-led management group bought a majority, controlling interest in Fuse Media. The management group includes key Fuse Media personnel, such as CEO Miguel “Mike” Roggero, Head of Content Distribution Judi Lopez, and Head of Ad Sales Fernando Romero.¹⁰ Fuse Media is unaffiliated with any MVPD.

19. Fuse Media owns two cable networks, Fuse and FM. Fuse provides general entertainment and lifestyle programming targeted to multicultural and multiethnic young

⁸ 47 U.S.C. § 536(b).

⁹ *About*, Fuse TV, <https://www.fuse.tv/about> (last visited Nov. 27, 2020).

¹⁰ Veronica Villafañe, *Latino-Led Management Team Acquires Controlling Interest In Fuse Media*, Forbes (Nov. 19, 2020), <https://www.forbes.com/sites/veronicavillafane/2020/11/19/latino-led-management-team-acquires-controlling-interest-in-fuse-media/>.

adults.¹¹ FM features music programming targeted to millennials.¹² An important part of Fuse Media’s mission is to serve the Latino audience, a historically underserved audience, with authentic representation of all aspects of their lives and Latino culture. FM is the rebranded version of NuvoTV after the merger of Fuse and NuvoTV in 2015.¹³ Fuse and FM are carried by multiple large cable and satellite multichannel video programming distributors (“MVPDs”), including DISH Network, Charter, Altice (Cablevision and Suddenlink), and Frontier, as well as online video distributors (“OVDs”), such as Sling TV and Fubo TV. [[BEGIN

CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

20. Fuse Media’s mailing address is 700 North Central Avenue Suite 6000, Glendale, CA 91203, and its telephone number is 323-256-8900.

B. AT&T

21. AT&T Inc. is an MVPD “engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming” within the meaning of Section 602(13) of the Communications Act and 47 C.F.R. § 76.1300(d).¹⁵

¹¹ *Fuse (TV channel)*, Wikipedia, [https://en.wikipedia.org/wiki/Fuse_\(TV_channel\)](https://en.wikipedia.org/wiki/Fuse_(TV_channel)) (last visited Nov. 27, 2020).

¹² R. Thomas Umstead, *Hilary Ready to Light Up a New ‘Fuse’*, Multichannel News (Sept. 28, 2015), <https://www.nexttv.com/news/hilary-ready-light-new-fuse-394097>.

¹³ R. Thomas Umstead, *Upfronts 2015: Nuvo TV to Meld into Fuse in Q3*, Next TV (Mar. 4, 2015), <https://www.nexttv.com/news/upfronts-2015-nuvo-tv-meld-fuse-q3-388505>.

¹⁴ Nielsen Media Research (11/30/20-12/27/20), Cable Network Traditional TV Coverage Area Household Universe Estimates for December 2020.

¹⁵ 47 U.S.C. § 522(13); 47 C.F.R. § 76.1300(d).

22. Before its acquisition of Time Warner, Inc. in 2018,¹⁶ AT&T was already a communications conglomerate that spanned DIRECTV, LLC (“DIRECTV”) and AT&T Services, Inc. (“AT&T Services”), among its many holdings.

23. AT&T distributes video programming through its DIRECTV (satellite TV), U-verse (IPTV), AT&T TV (OVD), and AT&T TV Now (OVD) platforms to nearly 18 million subscribers.¹⁷ AT&T also provides mobile and fixed voice and broadband services.

24. Since 2018, AT&T has also been the parent company of Warner Media, LLC (“Warner Media”), one of the world’s largest media and entertainment companies. The entertainment content it owns includes the networks TBS, TruTV, Adult Swim, TNT, and CNN.

25. TBS is a network that targets young adults, holding itself out to offer “escapist, leanback entertainment, featuring smart, imaginative stories with heart and comedic edge.”¹⁸ Its programming includes “scripted comedy series to late-night shows, game shows, and animated programming.”¹⁹

26. TruTV bills itself as “a bold, fresh entertainment network that gives viewers audacious content with laugh-out-loud moments and relatable characters” and provides “premium scripted, non-scripted and hybrid series.”²⁰

¹⁶ Press Release, *AT&T Complete Acquisition of Time Warner Inc.* (June 15, 2018), https://about.att.com/story/att_completes_acquisition_of_time_warner_inc.html.

¹⁷ Ben Munson, *AT&T Scales Back Q3 Video Sub Losses to 627,000*, Fierce Video (Oct. 22, 2020), <https://www.fiercevideo.com/video/at-t-scales-back-q3-video-sub-losses-to-627-000> (“AT&T ended the third quarter with 17.1 million premium TV subscribers (down 16.3% year over year) and 683,000 AT&T TV Now subscribers (down 40.3% year over year).”).

¹⁸ *Our Brands*, Warner Media, <https://www.warnermedia.com/us/brands> (last visited Nov. 27, 2020).

¹⁹ *Id.*

²⁰ *Id.*

27. Adult Swim is the “American adult-oriented nighttime programming block of the basic cable network Cartoon Network,” airing programming in the 9PM – 6AM time zone.²¹

28. TNT is a network with a longtime focus on drama that has recently refocused itself to also cover genres such as “blockbuster TV” and reality TV.²²

29. CNN is a 24-hour, news-focused television channel. CNN also features CNN Films, a series of in-depth documentaries focusing on topics such as race and politics.

30. AT&T’s mailing address is 208 S. Akard St., Dallas, Texas 75202, and its telephone number is 210-821-4105. DIRECTV’s mailing address is 2260 East Imperial Highway, El Segundo, CA 90245.

III. JURISDICTION, PRE-FILING NOTIFICATION, AND CERTIFICATION

31. The Commission has jurisdiction to adjudicate this matter pursuant to Section 616 of the Communications Act of 1934, as amended. This complaint is governed by the Commission’s program carriage regulations, 47 C.F.R. § 76.1300 *et seq.*

32. On November 25, 2020, Fuse Media provided AT&T with written notice of its intent to file a program carriage complaint pursuant to 47 C.F.R. § 76.1302(b),²³ alleging unlawful discrimination by AT&T. AT&T has not written anything in response to this letter to dispel the concerns about discriminatory treatment expressed.

²¹ *Adult Swim*, Wikipedia, https://en.wikipedia.org/wiki/Adult_Swim (last visited Nov. 27, 2020).

²² Michael Schneider & Kate Aurthur, *R.I.P. Cable TV: Why Hollywood is Slowly Killing Its Biggest Moneymaker*, Variety (July 21, 2020), <https://variety.com/2020/tv/news/cable-tv-decline-streaming-cord-cutting-1234710007/> (“TNT’s tagline was ‘We know drama’”); Michael Schneider, *WarnerMedia Blurs the Line Between TNT and TBS as It Preps for Its Streaming Future*, Variety (May 15, 2019), <https://variety.com/2019/tv/news/warnermedia-tbs-tnt-snowpiercer-upfronts-1203215822/>.

²³ The November 25, 2020 pre-filing notice is attached as Exhibit 1.

IV. STATUTORY AND REGULATORY BACKGROUND

A. Section 616 and the Carriage Rules Are Intended to Protect Competition and Diversity in the Programming Marketplace

33. Under Section 616 and the Program Carriage Rules, no MVPD may “engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”²⁴

34. Section 616 arose out of widespread concern on the part of the public and Congress itself about the growing vertical consolidation between powerful incumbent cable operators and programmers.²⁵ After hearing testimony from independent programmers, Congress concluded that “[t]he cable industry has become vertically integrated As a result, cable operators have the incentive and ability to favor their affiliated programmers.”²⁶

35. As the Commission put it when discussing the Act, “Congress was concerned that increased horizontal concentration and vertical integration in the cable industry . . . created an imbalance of power between cable operators and program vendors.”²⁷ And, the Commission went on, Congress concluded that “vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting

²⁴ 47 C.F.R. § 76.1301(c).

²⁵ Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 25-27 (1991).

²⁶ Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385 § 2(a)(5), 106 Stat. (1992).

²⁷ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *Second Report and Order*, 9 FCC Rcd. 2642, 2643 ¶ 2 (1993) (“*Second Implementation Report*”).

carriage on their systems,” and that programmers that compete with such vertically integrated entities “may suffer harm to the extent that they do not receive such favorable terms.”²⁸

36. Congress acted, giving non-affiliated programmers several tools to redress such discrimination.²⁹ Subsection (a)(3) of Section 616 directed the Commission to issue regulations that would prevent an MVPD from being able to “unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”³⁰

37. The Commission has complied with Congress’ direction. Subsection (c) of 47 C.F.R. § 76.1301 implements this statutory mandate by providing: “[n]o multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”

38. A *prima facie* case of a violation of 47 C.F.R. § 76.1301(c) requires the complainant to demonstrate that the MVPD’s behavior had “the effect of unreasonably

²⁸ *Id.*

²⁹ Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 25-27 (1991); *see also* Testimony of Preston Padden (INTV), Media Ownership, Diversity and Concentration, at 308, *quoted in* S. Rep. No. 102-92, at 26 (1991) (“You don’t need a PhD in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the *disadvantage* of those services, including local independent broadcasting stations, in which he does *not* have an equity position”) (emphasis in original).

³⁰ 47 U.S.C. § 536(a)(3).

restraining the ability of [the complainant VPV] to compete fairly,”³¹ that the complainant is “similarly situated to video programming” provided by the affiliated VPV,³² and that the defendant MVPD has treated the complainant “differently than the similarly situated” affiliate.³³ The complainant can demonstrate that it is similarly situated through a “combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.”³⁴ Fuse Media meets the “similarly situated” element.

V. STATEMENT OF FACTS

39. Fuse launched in 2003, originally as SiTV Network (subsequently renamed as NuvoTV), to serve Latinos in general, and Latinos watching English language programming in particular, as well as African-American and Afro-Latino audiences. From there, NuvoTV (subsequently renamed as Fuse Media) purchased Fuse in 2014 and quickly rose to become a star of the multiethnic, multicultural programming firmament. In 2015, the FM network launched. Today, Fuse and FM are carried by many large MVPDs, including DIRECTV/AT&T, Charter, DISH Network, Altice, and Frontier. Comcast dropped Fuse and FM in 2018, just after the Department of Justice consent decree regarding the acquisition of NBCUniversal had expired, dealing Fuse Media a serious blow. Comcast’s termination of Fuse was the principal factor compelling Fuse Media to resort to reorganization under the bankruptcy laws in early 2019. Fuse Media successfully emerged from the reorganization process in the same year, and rapidly started to recover lost ground. Its revival as a viable competitive threat in the multiethnic,

³¹ 47 C.F.R. § 76.1302(d)(3)(iii)(A).

³² 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

³³ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(ii).

³⁴ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

multicultural space reached an important milestone in November 2020, when Fuse Media was taken over by its Latino management, making it the only Latino-owned, controlled, and managed independent cable programmer.³⁵

A. The Fuse Media-AT&T Relationship.

40. Until recently, Fuse Media's relationship with AT&T had been a productive one. AT&T and Fuse Media first entered into an agreement for carriage of the Fuse network on August 7, 2006. This agreement has been renewed multiple times.

41. While AT&T has carried Fuse since the mid-2000s, DIRECTV, before it merged with AT&T, entered into an agreement to carry the Fuse network on December 31, 2014.³⁶

42. On July 24, 2015, AT&T officially acquired DIRECTV after obtaining the required regulatory approvals.³⁷

43. Shortly after AT&T acquired DIRECTV, Fuse Media entered into an agreement with AT&T and DIRECTV on January 8, 2016 to govern the carriage of the FM network.³⁸ This agreement was amended on June 30, 2016.³⁹ AT&T carries Fuse and FM on packages with lower penetration than those AT&T carries its similarly situated affiliated programming.

44. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

³⁵ Declaration of Judi Lopez ("Lopez Decl.") ¶ 5, attached as Exhibit 2.

³⁶ A copy of the agreement is attached as Exhibit 3.

³⁷ Press Release, *AT&T Completes Acquisition of DIRECTV*, AT&T (July 24, 2015), https://about.att.com/story/att_completes_acquisition_of_directv.html.

³⁸ A copy of the agreement is attached as Exhibit 4.

³⁹ A copy of the agreement is attached as Exhibit 5.

[REDACTED]

[REDACTED] [[END

CONFIDENTIAL]] Fuse programming is now carried on DIRECTV’s Choice, Ultimate, and Premier packages, and U-Verse’s U200, U200 Latino, U300, U300 Latino, U450, and U450 Latino packages. By comparison, AT&T’s affiliates TBS, TNT, Adult Swim, TruTV, and CNN all enjoy broader distribution—they are at a minimum also included in DIRECTV’s Entertainment and Lo Máximo packages. Indeed, AT&T’s favoritism with respect to the penetration granted its affiliated programmers was demonstrated only recently: in May 2019, DIRECTV added Boomerang and Revolt to additional packages and gave new carriage to CNN International. Two of these three networks are AT&T’s own affiliates.⁴⁰

B. AT&T’s Attitude Toward Fuse Media Changed Post-Vertical Integration.

45. In 2018, AT&T survived an antitrust challenge by the Department of Justice and consummated its acquisition of Time Warner Inc. In challenging the acquisition, the Department of Justice had expressed concern that, among other things, the two vertically integrated distributors, AT&T and Comcast, would tacitly coordinate with each other.⁴¹

46. Vertical integration seems to have caused a dramatic change in AT&T’s attitude and behavior toward Fuse Media. Until 2018, AT&T and Fuse Media operated in the spirit of a

⁴⁰ Lopez Decl. ¶ 10.

⁴¹ Complaint, *United States v. AT&T*, Case No. 1:17-cv-02511, at 20-21 (Nov. 20, 2017) (“[T]he merger would increase the likelihood and effect of oligopolistic coordination, particularly among certain vertically integrated MVPDs. . . . AT&T/DirectTV and Comcast/NBCU, which together have almost half of the country’s MVPD customers, would have an increased incentive and ability to harm competition by impeding emerging online competitors that they consider a threat, and increasing the prices for the networks they own.”). AT&T is also subject to a consent decree stemming from its coordination with other MVPDs to boycott the Dodgers sports network in Los Angeles. See Final Judgment, *United States v. DIRECTV Group Holdings, LLC, et al.*, Case No. 2:16-cv-08150-MWF-E (Oct. 2, 2017).

constructive partnership. After consummation of the Time Warner deal, the relationship degenerated into questionable tactics, including contract breach allegations by AT&T that compelled Fuse Media to seek declaratory relief from the courts,⁴² and reached its nadir with AT&T's recent spurning of Fuse Media's renewal efforts and pleas.⁴³

47. The first possible indication of questionable conduct came in the [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END

CONFIDENTIAL]]

C. Fuse Media Approaches AT&T to Begin Negotiations for a Renewal.

48. The current agreements between Fuse Media and AT&T/DIRECTV expire on [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] Desiring to renew the agreements to better serve each party's needs, Fuse Media reached out to AT&T to set up a meeting.⁴⁵

⁴² That litigation was settled.

⁴³ Lopez Decl. ¶ 12.

⁴⁴ *Id.* ¶ 13.

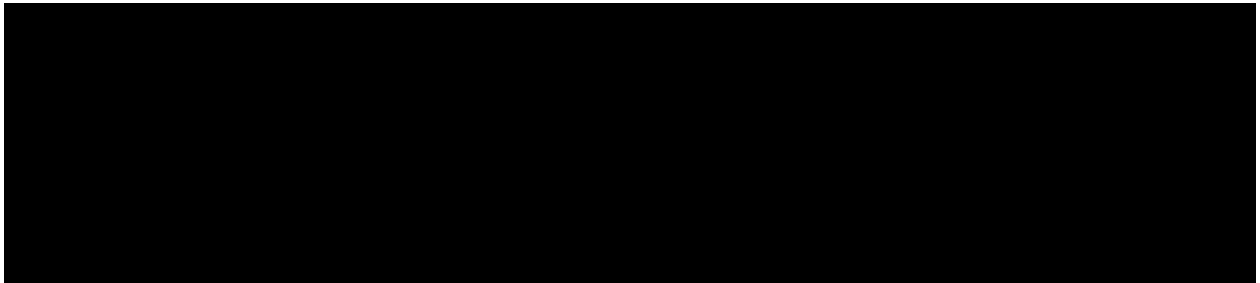
⁴⁵ *Id.* ¶ 14.

49. The meeting was held on a WebEx call on August 27, 2020. During the meeting, Fuse Media made its annual media presentation describing the programming on the networks, marketing partnerships, and other topics.⁴⁶

50. On September 4, Fuse Media followed up with AT&T by email, asking to schedule a meeting to discuss next steps.⁴⁷

51. That meeting occurred on September 10, 2020. During that meeting, the AT&T executives gave positive feedback on Fuse Media's presentation. Following the meeting, Judi Lopez, from Fuse Media, emailed both Mr. Ryan Smith and Ms. Dimple Simson, AT&T's representatives, to promise delivery of Fuse Media's renewal proposal.⁴⁸

52. On September 18, 2020, Ms. Lopez emailed both Mr. Smith and Ms. Simson the proposed renewal terms and renewal contract. These terms included [[BEGIN CONFIDENTIAL]]



■■■■■■■■■■ [[END CONFIDENTIAL]]⁴⁹

⁴⁶ *Id.* ¶ 15. A copy of the presentation is attached as Exhibit 6.

⁴⁷ A copy of the email is attached as Exhibit 7.

⁴⁸ A copy of the email is attached as Exhibit 8.

⁴⁹ A copy of this email and renewal proposal is attached as Exhibit 9.

53. On September 28, 2020, not having heard from AT&T, Ms. Lopez reached out to Mr. Smith and Ms. Simson to schedule a meeting to discuss the renewal offer.⁵⁰ Mr. Smith explained he had been out of the office but offered to schedule a meeting.⁵¹

54. On October 8, 2020, Ms. Lopez and Art Marquez from Fuse Media held a phone call with Mr. Smith and Ms. Belia Slattery to discuss the renewal terms. AT&T largely focused on [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

55. On October 13, 2020, Fuse Media's Mr. Marquez reached out again to AT&T's Mr. Smith to schedule a meeting to discuss the renewal terms.⁵³ The meeting was scheduled for October 20 (it would actually take place on October 21). In the run-up to the meeting, Fuse Media's Ms. Lopez requested [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END

CONFIDENTIAL]] Ms. Lopez emphasized that she was sure Fuse Media would be comfortable with AT&T's language.⁵⁴ AT&T had not yet provided those provisions.⁵⁵

⁵⁰ A copy of the email is attached as Exhibit 10.

⁵¹ *Id.*

⁵² Lopez Decl. ¶ 20.

⁵³ A copy of the email is attached as Exhibit 11.

⁵⁴ *Id.*

⁵⁵ Lopez Decl. ¶ 21.

56. At the October 21, 2020 call between AT&T and Fuse Media, the bulk of the discussion focused again on [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

57. Fuse Media worked on the [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] On November 3, 2020, Ms. Lopez reached out to Mr. Smith to follow up on that language.⁵⁸ Mr. Smith requested a few more days for evaluation.⁵⁹

58. It is useful to pause here and assess the status of the negotiation between the parties as of November 3, 2020. Fuse Media had made a presentation on August 27, 2020, made a renewal proposal on September 18, 2020, and drafted additional language regarding [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] on October 28, 2020. AT&T, for its part, had *not* made a counteroffer to Fuse Media's renewal proposal, had *not* responded to [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[[END CONFIDENTIAL]]

59. Here is a timeline reflecting all substantive and logistical communications between the parties.

⁵⁶ *Id.* ¶ 22.

⁵⁷ A copy of the email is attached as Exhibit 12.

⁵⁸ A copy of the email is attached as Exhibit 13.

⁵⁹ *Id.*

Date	Topic
Aug. 27, 2020	Fuse Media annual media presentation over WebEx to AT&T
Sept. 4, 2020	Fuse Media email to schedule meeting for next steps
Sept. 10, 2020	Meeting between Fuse Media and AT&T
Sept. 10, 2020	Follow up Fuse Media email to AT&T promising delivery of Fuse Media's renewal proposal
Sept. 18, 2020	Fuse Media email to AT&T with proposed renewal terms and renewal contract
Sept. 28, 2020	Fuse Media reaches out to schedule a meeting to discuss renewal offer.
Oct. 8, 2020	Call between Fuse Media and AT&T to discuss renewal terms
Oct. 13, 2020	Fuse Media reaches out to schedule a meeting to discuss renewal terms.
Oct. 21, 2020	Call between Fuse Media and AT&T
Oct. 22, 2020	Fuse Media email asking for follow up items from the Oct. 21 call
Oct. 28, 2020	Fuse Media email with [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]]
Nov. 3, 2020	Fuse Media reaches out to follow up on Oct. 28 email. AT&T requests more time to evaluate language.

60. Here is a timeline reflecting all substantive communications, all emanating from one party, Fuse Media.

Date	Topic
Aug. 27, 2020	Fuse Media annual media presentation over WebEx to AT&T
Sept. 10, 2020	Meeting between Fuse Media and AT&T (scheduled by Fuse Media)
Sept. 18, 2020	Fuse Media email to AT&T with proposed renewal terms and renewal contract

Oct. 8, 2020	Call between Fuse Media and AT&T to discuss renewal terms (scheduled by Fuse Media)
Oct. 21, 2020	Call between Fuse Media and AT&T (scheduled by Fuse Media)
Oct. 28, 2020	Fuse Media email with [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]]

61. Here is a list of the emails to which AT&T has provided no substantive response whatsoever:

Date	Topic
Sep. 18, 2020	Fuse Media email to AT&T with proposed renewal terms and renewal contract
Nov. 3, 2020	Fuse Media follow-up email to AT&T with request to connect that week

62. And here is a collection of what AT&T has written to Fuse Media regarding renewal, which can be condensed into one short paragraph describing talks about having talks:

[[BEGIN CONFIDENTIAL]] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

⁶⁰ See Exhibit 7.

⁶¹ See Exhibit 7.

⁶² See Exhibit 10.

63. On November 19, 2020, Ms. Lopez emailed Mr. Smith and other AT&T executives to reiterate Fuse Media's desire to reach an amicable agreement.⁶⁸ Ms. Lopez reminded Mr. Smith that it had been nearly three months since the initial presentation, two months since Fuse Media had sent AT&T the draft extension language, and a month since Fuse Media and AT&T had last had a phone call. In that entire time, AT&T had failed to send a marked-up version of the draft extension, give any comments on the extension terms, or make any suggestion as to the timing for completion of a renewal. Ms. Lopez referenced the 15-year relationship that had proceeded without difficulty. Ms. Lopez requested that AT&T send a redline response to the extension agreement by November 24, 2020; in turn, Fuse Media promised to review and respond before the Thanksgiving break.⁶⁹

⁶³ See Exhibit 11.

⁶⁵ *See id.*

⁶⁷ See Exhibit 13.

⁶⁹ Lopez Decl. ¶ 24.

25

65. On November 25, 2020, Fuse Media sent a pre-filing notification letter to AT&T. In the letter, Fuse Media reiterated its desire to reach an amicable agreement without the need for litigation before the Commission.⁷¹

66. At long last, Fuse Media's letter evidently precipitated action by AT&T. On December 1, 2020, AT&T provided Fuse Media with a counteroffer to its September 18, 2020 proposal.⁷² But the counteroffer was insultingly hollow. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

67. On December 3, 2020, Ms. Lopez responded to AT&T. The response attached a proposal that emphasized [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] In her cover

email, Ms. Lopez explained the role Fuse Media plays in serving a very important demographic—bilingual and English-language Latinos—which make up over a fifth of DIRECTV's subscribers. Ms. Lopez expressed concern that the result of AT&T's [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] would be to drop the last of the

⁷¹ *Id.* ¶ 26.

⁷² The counteroffer and cover email are attached as Exhibit 16.

⁷³ This counterproposal is attached as Exhibit 17.

independent networks serving this demographic, noted Fuse Media's readiness to have productive conversations on the deal points, and requested a call for early in the following week to discuss.

68. On December 9, 2020, AT&T responded to state that they received Fuse's counterproposal and that the [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

69. AT&T has not responded to Fuse Media's counterproposal, or Ms. Lopez's request for a call, to date. Nor has AT&T written anything in response to Fuse Media's November 25, 2020 pre-filing notification letter to dispel the concerns about discriminatory treatment expressed in that letter.

ARGUMENT

VI. FUSE PROGRAMMING IS SIMILARLY SITUATED TO AT&T AFFILIATED PROGRAMMING

70. The programming of Fuse is similarly situated to the entertainment and lifestyle programming provided by Turner Broadcasting System video programming vendors (TBS, TNT, TruTV, Adult Swim and CNN) affiliated with AT&T. The relevant question that antecedes a finding of unlawful discrimination under the Program Carriage Rules is whether a video programming vendor's *programming* is similarly situated to *programming* offered by an MVPD-affiliated vendor. Neither the statute nor the implementing rules require a showing that the two vendors' *networks* are similarly situated.⁷⁵

⁷⁴ This email is attached as Exhibit 18.

⁷⁵ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

71. The Commission has particularly emphasized the need to demonstrate similarly situated programming, not similarly situated networks, at the *prima facie* stage of a complaint. The *2011 Order* clarified that circumstantial evidence supporting a *prima facie* case of discrimination includes “evidence that [the programmer] provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD.”⁷⁶ And in doing so, the Commission instructed the Media Bureau to “assess on a case-by-case basis whether the complaint contains evidence to establish at the *prima facie* stage that the affiliated and unaffiliated video programming is similarly situated.”⁷⁷ While the Media Bureau has found that a complainant has made the required *prima facie* showing through evidence that the complainant’s network is similarly situated to one or more networks affiliated with an MVPD, the Media Bureau has also confined its similarly situated analysis to programming on numerous occasions.⁷⁸

⁷⁶ Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order, and Notice of Proposed Rulemaking*, 26 FCC Rcd. 11494, 11504 ¶ 14 (2011) (“*2011 Order*”), *vacated in part by Time Warner Cable, Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013).

⁷⁷ *Id.* at 11504 ¶ 14 n.57.

⁷⁸ See *beIN Sports, LLC v. Comcast Cable Communications, LLC, and Comcast Corporation*, *Memorandum Opinion and Order*, 33 FCC Rcd. 7476, 7480 ¶ 13 (2018) (complaint lacked “evidence sufficient to support its claim that the programming it would provide under the renewal agreement is similarly situated to the video programming provided by Comcast’s affiliated vendors, NBCSN and Universo, as required under Section 76.1302(d)(3)(iii)”; *Word Network Operating Company d/b/a The Word Network v. Comcast Corporation and Comcast Cable Communications, LLC*, *Memorandum Opinion and Order*, 32 FCC Rcd. 7704, 7716 ¶ 27 (2017) (complainant did not “provide evidence that the programming it provides is similarly situated to video programming provided by a vendor affiliated with Comcast”).

72. In any event, Fuse is a similarly situated network to AT&T affiliates TBS, TruTV, Adult Swim, and TNT.⁷⁹ A complainant does not need to demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination;⁸⁰ the Commission has found that two sports networks—independent beIN and Comcast affiliate NBC Sports—are similarly situated on the basis of “genre, target programming, and target audience.”⁸¹ And in *Tennis Channel*, the Commission found that the Tennis Channel, Golf Channel, and Versus were similarly situated because they all provided sports programming, targeted the same demographics, and had an overlap in advertisers.⁸²

73. The Media Bureau has found that complainants have made the requisite *prima facie* showing on similar grounds. In *WealthTV*, the Bureau found that complainant WealthTV—a network focused on “inspirational and aspirational programming about prosperous and fulfilling lifestyles—had made a *prima facie* showing of discrimination as to MOJO, an MVPD-affiliated network with “principal programming consist[ing] of sports, movies, music concerts, and reality series.”⁸³ The Bureau found that WealthTV and MOJO featured similar

⁷⁹ Sklar Decl. ¶ 2.

⁸⁰ Herring Broadcasting, Inc. d/b/a/ WealthTV, Complainant v. Time Warner Cable, Inc., Defendant et al., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14795 ¶ 12 (2008) (“*WealthTV*”); NFL Enterprises LLC, Complainant v. Comcast Cable Communications, Defendant, *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14822-23 ¶ 75 (2008) (“*NFL*”).

⁸¹ beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC and Comcast Corporation, Defendants, *Memorandum Opinion and Order*, 34 FCC Rcd. 5244, 5252 ¶ 22 (2019) (“*Second beIN Order*”).

⁸² Tennis Channel, Inc., Complainant v. Comcast Cable Communications, LLC, Defendant, *Memorandum Opinion and Order*, 27 FCC Rcd. 8508, 8527 ¶¶ 51-54 (2012), *reversed on other grounds by Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

⁸³ *WealthTV*, 23 FCC Rcd. at 14799-800 ¶ 25.

programming on a broad range of topics such as “wine, automobiles, sports interviews, food, and electronics.”⁸⁴ And in *NFL*, the Bureau found that the NFL Network was similarly situated to Comcast affiliates Versus and the Golf Channel because they were all national sports networks competing in programming, advertising, and target viewers.⁸⁵ The Commission specifically rejected Comcast’s argument that the programming was not similarly situated because the NFL Network did not show identical programming to Versus or the Golf Channel.⁸⁶ The Commission determined that two sports programs could be similarly situated, even though one is focused on golf and the other on American football.⁸⁷

74. Fuse’s entertainment and lifestyle programming is similarly situated to the programming offered by AT&T affiliates TBS, TruTV, Adult Swim, TNT, and CNN to a greater extent than in the facts examined by the Commission and Media Bureau in these cases, based on a “combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.”⁸⁸

Genre.

75. In *GSN*, the Commission found that the record in the proceeding reflected that 93% of the programming of WEtv—one of the Cablevision-affiliated networks at issue in the

⁸⁴ *Id.* at 14795 ¶ 13.

⁸⁵ *NFL*, 23 FCC Rcd. at 14822-23 ¶ 75; *see also* TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14829 ¶ 90 (2008).

⁸⁶ *See NFL*, 23 FCC Rcd. at 14822-23 ¶ 75 (“Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.”).

⁸⁷ *Id.*

⁸⁸ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

proceeding—fell into one of five genres: the reality, drama, comedy, movie, and news genres.⁸⁹

This finding has an important ramification for this proceeding: a network's programming is not limited to a single or handful of genres, but may fall within many. The corollary of this is that two networks may be similarly situated when they both prominently feature a common genre or genres, even when they also extend to other genres that do not coincide.

76. Fuse features programming falling within the same genre as TBS, Adult Swim, TruTV, TNT, and CNN. TBS's programming is predominantly composed of live-action sitcoms and movies. Fuse likewise features such live-action sitcoms and movies. This is a strong indication that Fuse and TBS offer substantially similar programming.⁹⁰ Fuse's full day genre composition has become increasingly comparable to TBS's over the past four years. Fuse went from 100% music videos in 2015 to approximately 60% sitcom/movie mix by 2017, and has maintained that percentage today. Indeed, 45% of Fuse's programming today is sitcoms, while 65% of TBS's programming is sitcoms. Both networks air popular syndicated sitcom programming that features well-known stars: "Everybody Hates Chris" (featuring Chris Rock); "Malcolm In The Middle" (featuring Bryan Cranston); and "The Mindy Project" (featuring Mindy Kaling) for Fuse, and "Seinfeld" (featuring Jerry Seinfeld); "Brooklyn Nine-Nine" (featuring Andy Samberg); and "Everybody Loves Raymond" (featuring Ray Romano) for TBS.⁹¹ The percentage of movie programming for Fuse and TBS is also similar—12% for Fuse

⁸⁹ Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant, *Memorandum Opinion and Order*, 32 FCC Rcd. 6160, 6175 ¶ 48 (2017) ("GSN").

⁹⁰ Sklar Decl. ¶ 7.

⁹¹ Lopez Decl. ¶ 31.

and 18% for TBS.⁹² Fuse and TBS purchase their movie programming from the same distributors.⁹³

77. TBS, like Fuse, also features reality television programming. Both networks feature shows falling within at least three of the same reality television sub-genres. Both networks air lifestyle-oriented reality programming—the series “Lost Resort” for TBS, which features nine strangers embarking on a self-discovery trip at a wellness retreat,⁹⁴ and “Clothes Minded” for Fuse, a reality program in which young adults go on a journey of self-discovery.⁹⁵ Fuse and TBS both air comedic reality programming that highlights people with unusual jobs and skills—the Go-Big Show on TBS, and That White People Shit on Fuse.⁹⁶ Both networks also air reality television programming featuring celebrities in unusual situations. For TBS: Celebrity Show-Off.⁹⁷ For Fuse: Made From Scratch and Struggle Gourmet.⁹⁸ Additionally, Fuse and TBS each currently air series that focus on e-sports—Modern Day Gladiators and

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *About*, Lost Resort, TBS, <https://www.tbs.com/shows/lost-resort> (last visited Dec. 8, 2020).

⁹⁵ *Struggle Gourmet*, Fuse, <https://www.fuse.tv/shows/struggle-gourmet> (last visited Dec. 8, 2020); Etan Vlessing, *Fuse Media Acquires Transgender Makeover Series ‘Clothes Minded’ (Exclusive)*, Hollywood Reporter (Sept. 21, 2020), <https://www.hollywoodreporter.com/news/fuse-media-acquires-transgender-makeover-series-clothes-minded-exclusive>.

⁹⁶ *About*, Go-Big Show, TBS, <https://www.tbs.com/shows/go-big-show> (last visited Dec. 8, 2020); *That White People Shit*, Fuse, <https://www.fuse.tv/shows/that-white-people-shit> (last visited Dec. 8, 2020).

⁹⁷ *About*, Celebrity Show-Off, TBS, <https://www.tbs.com/shows/celebrity-show-off> (last visited Dec. 8, 2020).

⁹⁸ *Made From Scratch*, Fuse, <https://www.fuse.tv/shows/made-from-scratch> (last visited Dec. 8, 2020); *Struggle Gourmet*, Fuse, <https://www.fuse.tv/shows/struggle-gourmet> (last visited Dec. 8, 2020).

ELEAGUE, respectively. Both Fuse and TBS also air talk show series. Fuse offers “Like, Share, Dimelo,” hosted by Latina comedians Dee Nasty and Sasha Merci, which focuses on topics like politics, pop culture, and dating.⁹⁹ TBS, for its part, offers “Full Frontal with Samantha Bee,” which focuses on politics, as well as “Conan.”¹⁰⁰

78. Fuse, Adult Swim, and TBS are also similarly situated because they feature programming falling within the adult animation genre. Fuse has become increasingly focused on creating and featuring a mix of original adult animation. These shows include *Sugar & Toys*, *Hollywood Puppet Shit Show*, and original quirky 15-minute live action sitcoms (Ming’s *Dynasty*, WTF Baron Davis). Adult Swim’s programming is composed almost entirely of adult cartoons and quirky 15-minute live-action sitcoms, which are featured only in the evening, night, and early morning hours. As for TBS, it features adult cartoons *American Dad*, *Bob’s Burgers*, *Family Guy*, *Final Space*, *Storyville*, and *Tarantula*. Fuse and Adult Swim are the only networks featuring live action sitcoms in the 15-minute format.¹⁰¹

79. Fuse and TruTV are both entertainment networks that air comedic programming. Comedic programming featured on Fuse shares the same, narrow focus as comedic programming on TruTV, evidencing that the two networks are similarly situated.¹⁰² One example is a recent shared focus on comedic programming revolving around food, with TruTV following Fuse’s lead. For two years, Fuse has aired “Fluffy’s Food Adventures,” which follows stand-up

⁹⁹ *Like, Share, Dimelo*, Fuse, <https://www.fuse.tv/shows/like-share-dimelo/BroKjPn1VT8> (last visited Dec. 9, 2020).

¹⁰⁰ *Full Frontal with Samantha Bee*, TBS, <https://www.tbs.com/shows/full-frontal-with-samantha-bee> (last visited Dec. 9, 2020); *Conan*, TBS, <https://www.tbs.com/shows/conan> (last visited Dec. 9, 2020).

¹⁰¹ Lopez Decl. ¶ 33.

¹⁰² Sklar Decl. ¶ 13.

comedian Gabriel “Fluffy” Iglesias on his culinary trips around the country,¹⁰³ in addition to the previously mentioned “Made From Scratch” and “Struggle Gourmet” series. TruTV rushed to join: it recently announced the upcoming cooking competition “Fast Foodies”—advertised as a tongue-in-cheek cooking competition featuring celebrities.¹⁰⁴ Strikingly, both Fuse and TruTV also air programming that features NBA basketball players. Fuse’s “WTF Baron Davis” revolves around the unorthodox mentorship of social media phenom BDot (Brandon Armstrong) by Baron Davis, a retired NBA All-Star.¹⁰⁵ TruTV again has sought to emulate Fuse: it has just announced the greenlighting of “Double Cross with Blake Griffin,” a prank show that features NBA All-Star Blake Griffin.¹⁰⁶

80. TNT, like Fuse, is also an entertainment network. And while it was traditionally focused on drama programming, AT&T has placed an increased focus on reducing the distinctions among TNT, TBS, and TruTV, and has refocused TNT to extend to genres such as unscripted and reality television.¹⁰⁷ The series “Shaq Life” is one representative example. Like Fuse and TruTV programming, “Shaq Life” focuses on an NBA star—Shaquille O’Neil—and

¹⁰³ *Fluffy’s Food Adventures*, Fuse, <https://www.fuse.tv/shows/fluffy-s-food-adventures/EqONBrAg7fKj> (last visited Dec. 9, 2020).

¹⁰⁴ Press Release, *truTV Serves Up Comedic Cooking Competition Series “Fast Foodies”*, Warner Media (Oct. 28, 2020), <https://pressroom.warnermedia.com/na/media-release/trutv/trutv-serves-comedic-cooking-competition-series-fast-foodies>.

¹⁰⁵ *WTF Baron Davis*, Fuse, <https://www.fuse.tv/shows/wtf-baron-davis/yw11xz33wHJo> (last visited Dec. 9, 2020).

¹⁰⁶ Press Release, *truTV Scores a Slam Dunk With Series Order for Double Cross with Blake Griffin*, Warner Media (Oct. 1, 2020), <https://pressroom.warnermedia.com/na/media-release/trutv/trutv-scores-slam-dunk-series-order-double-cross-blake-griffin>.

¹⁰⁷ Michael Schneider, *WarnerMedia Blurs the Line Between TNT and TBS as It Preps for Its Streaming Future*, *Variety* (May 15, 2019), <https://variety.com/2019/tv/news/warnermedia-tbs-tnt-snowpiercer-upfronts-1203215822/>.

the show falls within the reality genre, following Shaq around as he goes on tour as a DJ, trains for a boxing match, and raises his children.¹⁰⁸ While TNT does not have a large concentration of sitcoms, it programs dramas with strong comedic content, such as “Claws,” “Franklin & Bash,” and “Librarians.”¹⁰⁹

81. Fuse and CNN, in turn, both feature programming in the documentary genre. Fuse’s award-winning and world-class Fuse Docs and Fuse Films series compete with original and acquired documentaries on CNN & HBO. Fuse Docs are sophisticated social issue-driven documentaries, similar to those found on CNN and HBO. Fuse and CNN have each aired documentaries about empowering females—Fuse’s “She Started It” and CNN’s “Girl Rising” and “We Will Rise”; the failings of the American justice system—Fuse’s “It’s Criminal” and CNN’s “American Jail”; and personal stories of immigration—Fuse’s “Colossus” and “Indivisible” and CNN’s “Documented.” As discussed in further detail below, Fuse documentaries regularly compete with those of CNN for awards.¹¹⁰

Target audience and programming.

82. Fuse and TBS also seek to attract diverse, multiethnic audiences. Fuse Media is under Latino ownership and management, and seeks to serve the Latino audience with authentic representation of all aspects of their lives and culture.¹¹¹ Fuse also strives to amplify voices in

¹⁰⁸ *About*, Shaq Life, TNT, <https://www.tntdrama.com/shaq-life> (last visited Dec. 9, 2020).

¹⁰⁹ *See Shows*, TNT, <https://www.tntdrama.com/shows> (last visited Dec. 9, 2020); Sklar Decl. ¶ 12.

¹¹⁰ Lopez Decl. ¶ 36.

¹¹¹ Veronica Villafañe, *Latino-Led Management Team Acquires Controlling Interest In Fuse Media*, Forbes (Nov. 19, 2020), <https://www.forbes.com/sites/veronicavillafane/2020/11/19/latino-led-management-team-acquires-controlling-interest-in-fuse-media/>.

need of representation in an authentic way, and is committed to creating and acquiring powerful series, documentaries, and independent films that entertain and empower multicultural audiences.¹¹² TBS, for its part, holds itself out as committed to diversity in its programming, as early as 2010.¹¹³ In 2014, TBS and TNT partnered with the Black List to increase diversity in their programming and writers' rooms.¹¹⁴ In 2018, Warner Media, which includes TBS, promised to increase diversity in its programming and talent.¹¹⁵ And earlier this year, TBS, TNT, and HBO held a pop-up experience at Sundance to "celebrate their commitment to multicultural storytelling, creators and audiences."¹¹⁶

83. What is more, Fuse is a better conduit into the living rooms of that audience than AT&T's affiliated programming. As Fuse Media's Ms. Judi Lopez has pointed out to AT&T, even in Spanish-dominant households, about 75% of the programming watched is in English.

¹¹² Jillian Morgan, *Fuse Sets Music-Focused Docs as Part of Summer Programming*, Realscreen (June 10, 2020), <https://realscreen.com/2020/06/10/fuse-sets-music-focused-docs-as-part-of-summer-programming/>.

¹¹³ Megan Angelo, *At TBS, Diversity Pays Its Own Way*, N.Y. Times (May 28, 2010), <https://www.nytimes.com/2010/05/30/arts/television/30tbs.html> ("In a television world where 'The Fresh Prince of Bel-Air' and 'The Cosby Show' are distant memories, TBS has quickly become the home of minority-driven comedy.").

¹¹⁴ Mikey O'Connell, *The Black List Moves into TV with TNT and TBS Diversity Program*, Hollywood Reporter (Feb. 3, 2014), <https://www.hollywoodreporter.com/news/black-list-moves-tv-tnt-676709>.

¹¹⁵ Patrick Hipes, *WarnerMedia Unveils Company-Wide Diversity and Inclusion Policy, From Film to TV*, Deadline (Sept. 5, 2018), <https://deadline.com/2018/09/warner-bros-hbo-turner-diversity-inclusion-policy-michael-b-jordan-warnermedia-1202457597/> ("AT&T's newly branded WarnerMedia, which encompasses Warner Bros, Turner and HBO, has taken the wraps off a companywide policy outlining its commitment to diversity and inclusion both in front and behind the camera on its film, TV and digital output.").

¹¹⁶ Dino-Ray Ramos, *HBO, TNT and TBS Team for Sundance 'Our Stories to Tell' Multicultural Pop-Up Experience*, Deadline (Jan. 17, 2020), <https://deadline.com/2020/01/hbo-tnt-tbs-sundance-film-festival-our-stories-to-tell-diversity-inclusion-representation-1202834003/>.

While diverse content and audiences are stated priority goals for the Turner networks as well, including TBS, Adult Swim, TruTV and TNT, and this is one of the many factors making the Turner and Fuse programming similarly situated, at present the goal seems largely aspirational for Turner, and Fuse Media has achieved it to a significantly greater extent. Fuse is better attuned to speak to that audience than the Turner networks.

84. Fuse has also competed for content and talent with AT&T's affiliated networks. Celebrity talent that is booked on Fuse programs is often also booked on TBS, including Action Bronson, Diplo, and Snoop Dogg.¹¹⁷ And Fuse's "Ready Or Not" is a follow-up to its filmmaker's previous documentary, HBO's "Running with Beto." Both shows follow underdog progressive candidates running for office.¹¹⁸ Furthermore, the shows aired by Fuse often rely on the same screenwriters as those aired by the AT&T affiliated networks. For example, Fuse's current animated series, Sugar & Toys, now in its second season, is created, produced, and written by Brian Ash and Carl Jones, who between them have written and produced seven different programs appearing on AT&T affiliated networks: The Boondocks (Adult Swim); Black Dynamite (Adult Swim); Freaknik: The Musical (Adult Swim); The Last O.G. (TBS); Young Love (HBO Max); The Jellies (Adult Swim); and Lazor Wulf (Adult Swim).¹¹⁹ This overlap of talent and the creative sensibilities underlying Sugar & Toys and so many Adult Swim shows suggests there is good reason [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]] All of these shows have similar voices and speak to similar audiences.¹²⁰

¹¹⁷ Lopez Decl. ¶ 39.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Sklar Decl. ¶ 18.

Turner ads on Fuse.

85. There is probably no stronger proof that two programmers are similarly situated than evidence that one has to “steal” the viewers of the other. This is precisely what the Turner networks have been doing by purchasing ads on Fuse. Specifically, [[BEGIN

CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

Competition for the same content.

86. Also important is the competition between Fuse and the AT&T affiliate networks for the same content. In one telling example, Fuse aired five seasons of television programming in partnership with Complex, a lifestyle publication and brand, between 2017 and 2019, including Complex’s highly successful Hot Ones series. Subsequently, AT&T’s TruTV obtained the intellectual property rights to Complex’s Hot Ones and expanded that programming into a full series and different format (a 5-8 minute segment within the “Complex x Fuse” program on Fuse versus 30-minute format on TruTV).¹²³

¹²¹ Lopez Decl. ¶ 40.

¹²² *Id.*

¹²³ Lopez Decl. ¶ 41.

Competition for the same awards.

87. Another powerful factor that is not often seen in the “similarly situated” analysis is the competition between the two programming families for the same awards, often in the same category.¹²⁴ A key selling proposition for any successful network, including perhaps most prominently AT&T’s affiliates CNN and HBO, is the number of awards it wins.¹²⁵ This is critical for a brand built on smart, quality programming for an elite audience. The Peabody Awards are widely regarded as the most prestigious awards in television. HBO has won a Peabody Award for a documentary every year for at least the past ten years except for 2017, which is the year Fuse won its first Peabody for the Fuse Doc ‘Indivisible’.¹²⁶

88. Fuse started aggressively pursuing prestige and diversity awards beginning in 2017 with originals and new franchise Fuse Docs. The results have been impressive, and impressively fast. Ever since it got into the awards game in 2017, Fuse has garnered an impressive 25 nominations and wins for various prestige and diversity awards. See the following list, which details all the instances in which Fuse competed with AT&T affiliate networks, with Fuse in green and AT&T affiliate networks in blue.¹²⁷

2017 Imagen Awards

Best Variety or Reality Show

- America Latino (LATV Networks)
- Cesar Millan’s Dog Nation (Nat Geo Wild; Leepson Bounds Entertainment for National Geographic)
- **WINNER: Fluffy Breaks Even** (Fuse TV; Arsonhouse Entertainment, B-17 Entertainment, Fluffy Shop Studios)

¹²⁴ Sklar Decl. ¶ 14.

¹²⁵ See *id.*

¹²⁶ Lopez Decl. ¶ 42.

¹²⁷ *Id.* ¶ 43.

- **Real Time with Bill Maher** (HBO; HBO Entertainment in assoc. w/ Bill Maher Productions and Brad Grey Television)
- **The Real** (Telepictures Productions/Warner Bros Domestic Television Distribution)
- The Riveras (Universo; Blank Paige Productions)

2017 NAMIC Vision Awards

Comedy

- ABC – black-ish
- Fuse – **Fluffy Breaks Even**
- HBO – **Ballers**
- **WINNER:** HBO – **Insecure**
- Starz – Survivor’s Remorse

2018 NAMIC Vision Awards

Documentary

- 30 for 30: Celtics vs Lakers: The Best of Enemies – ESPN
- **WINNER:** **Baltimore Rising** – HBO
- **Indivisible** – Fuse
- **Rock and a Hard Place** – HBO
- Whitney. “Can I Be Me” – Showtime
- The 44th President: In His Own Words – HISTORY

2018 Imagen Awards

Best Variety or Reality Show

- MasterChef Latino (Telemundo; Endemol Shine Boomdog)
- **Felipe Esparza: Translate This** (HBO; HBO Entertainment in association with Felipe’s World and Unreel Media)
- **George Lopez: The Wall, Live from Washington, D.C.** (HBO; HBO Entertainment in association with Travieso Productions and Dakota North Entertainment)
- **Fluffy’s Food Adventures** (Fuse; Arsonhouse Entertainment, B-17 Entertainment, Fluffy Shop Studios)
- **WINNER:** Pati’s Mexican Table (WETA/American Public Television; Co-production of Mexican Table LLC, WETA Washington DC, and FRANK)

2019 Imagen Awards

Best Variety or Reality Show

- **WINNER:** **Hip-Hop Houdini** (Fuse; 7Beyond)
- **Last Week Tonight** (HBO; HBO Entertainment in association with Sixteen String Jack Productions and Avalon Television)

- Mexican Dynasties (Bravo; Shed Media and Campanario Entertainment)
- Mira Quien Baila: All Stars (Univision; Endemol Shine Boomdog, Univision Studios)
- Pati's Mexican Table (WETA Washington, DC / American Public Television; Mexican Table, LLC, WETA Washington, DC, FRANK. and Switchblade)
- World of Dance (NBC; Universal Television Alternative Studio in association with Nuyorican Productions and World of Dance)

2019 NAACP Image Awards

Outstanding Documentary (Television)

- Hope & Fury: MLK, The Movement and the Media (NBC)
- King in the Wilderness (HBO)
- **WINNER:** Say Her Name: The Life and Death of Sandra Bland (HBO)
- Shut Up & Dribble (Showtime)
- Time For Ilhan (Fuse)

2019 NAMIC Vision Awards

Digital Media – Short Form

- **WINNER:** 25 Influential American Muslims – CNN
- CNN 'Impact Your World' #ShowLove – CNN
- ESPN Features – SC Reportajes: Puños Eternos (Eternal Fists) – ESPN
- Glor's Story – NBC Asian America
- Indivisible Cast Update: Where Are They Now? – Fuse

Documentary

- American Masters – Basquiat: Rage to Riches – Thirteen/WNET
- Into the Okavango – National Geographic
- **WINNER:** Rest in Power: The Trayvon Martin Story – Paramount Network
- Shut Up and Dribble – SHOWTIME Documentary Films
- Time for Ilhan – Fuse
- Traffic Stop – HBO
- We Are Not Done Yet – HBO

2020 Imagen Awards

Best Documentary

- Colossus (Fuse; Campanario, Perimeter Pictures)
- The First Rainbow Coalition (PBS; Latino Public Broadcasting, Nantes Media, LLC, Good Docs, ITVS)
- Home: Mexico (Apple TV+; Apple / MediaWeaver / Four M Studios / Altimeter Films)
- POV: The Silence of Others (PBS; Semilla Verde Productions, Lucernam Films, American Best Documentary | POV, Independent Television Service (ITVS) and Latino

Public Broadcasting (LPB), in association with El Deseo, with funding from the Corporation for Public Broadcasting (CPB).)

- **WINNER:** Sea of Shadows (National Geographic; Terra Mater Factual Studios in association with Appian Way, Malaika Pictures, The Wild Lens Collective for National Geographic Best Documentary Films)
- **Torn Apart: Separated at the Border** (HBO; HBO Best Documentary Films in association with Talos Films)
- VOCES: Porvenir, Texas (PBS; Latino Public Broadcasting, PBS SoCal)

2020 NAMIC Vision Awards

Original Movie or Special

- **Collisions – Fuse**
- **WINNER:** I am Somebody’s Child: The Regina Louise Story – Lifetime
- **Native Son – HBO**
- **O.G. – HBO**

Target audience metrics.

89. The viewers of both Fuse and TBS skew female [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]¹²⁸ They also skew young. The median age for Fuse is

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Fuse hones its content for younger viewers. It states that it provides “cultural-based content and experiences for a multicultural

¹²⁸ *Id.* ¶ 44.

¹²⁹ *Id.*

¹³⁰ *Id.*

millennial and GenZ audience.”¹³¹ Similarly, the Warner Media For Brands website emphasizes Adult Swim is “#1 with millennials 14 years in a row.”¹³²

90. Just as important,¹³³ most viewers of Fuse also watch TBS, TNT, and Adult Swim. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

91. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³¹ Fuse.TV, Fuse Media, <https://www.fuse.tv/about> (last visited Dec. 9, 2020).

¹³² *Entertainment and Emerging Consumers*, WarnerMedia For Brands, <https://www.warnermediaforbrands.com/divisions/entertainment> (last visited Dec. 9, 2020).

¹³³ See *Game Show Network, LLC v. Cablevision Systems Corp.*, *Initial Decision of Chief Administrative Law Judge Richard L. Sippel*, 31 FCC Rcd. 13841, 13882 ¶ 68 (2016) (“This fact in particular— i.e., that WE tv viewers switched to GSN significantly more often than they switched to Wedding Central—demonstrates the substantial commonality among the three networks' target audience because WE tv and Wedding Central had virtually identical programming that indisputably targeted the same audience.”), *reversed by GSN*, 32 FCC Rcd. 6160.

¹³⁴ Lopez Decl. ¶ 45.

¹³⁵ *Id.* ¶ 46.

¹³⁶ *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[[END CONFIDENTIAL]]¹³⁹

92. Viewer demographics for Fuse and AT&T affiliated programming also show striking similarities. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* ¶ 47.

¹⁴¹ *Id.*

¹⁴² *Id.*

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [[END

CONFIDENTIAL]]

Ratings.

93. Cost-adjusted ratings show that Fuse is comparable to the Turner networks. While naturally much smaller than the Turner networks, here too, Fuse has managed to punch above its weight.

94. Even before any adjustment for the cost of each network is made, and even setting aside Nielsen's undercounting of independent programmers' audiences that is well-known in the industry, Fuse's ratings are in the same ballpark as those of a number of Turner networks. Nielsen data for December 2018, the last month Fuse Media was carried by Comcast, show the popularity of Fuse's programming as compared to that of AT&T's affiliated networks. [[BEGIN

CONFIDENTIAL]] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 49.

¹⁴⁶ *Id.*

95. Fuse’s Nielsen ratings for November 2020 are down from December 2018 as a result of loss of distribution.¹⁴⁹ This decrease is in large part a result of the loss of carriage on Comcast. These lower ratings are also consistent with the generally lower ratings of AT&T’s affiliated networks during that same period, with the exception of CNN, which primarily aired election coverage during an election.¹⁵⁰

[[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

153 *Id.*

[REDACTED] [[END CONFIDENTIAL]] As both Ms. Lopez and Mr. Sklar attest, even these comparisons show that Fuse can, and does, punch above its weight, and that it overcomes the enormous seigniorial privileges that the Turner networks enjoy because they are so well established and because they are affiliated with one of the nation's largest distributors.¹⁵⁵ The Turner networks are among the longest running networks on cable. TBS started as early as 1976. As a consequence, they have had the benefit of a much longer runway than Fuse, and the opportunity to develop greater familiarity with the brand.¹⁵⁶ It would of course be inappropriate to interpret the similarly situated test so narrowly as to require the same vintage and length of runway for an independent programmer as for a programmer of the type of AT&T's affiliated networks. Fuse's expert witness, Mr. Sklar, has confirmed the reasonableness of these calculations and conclusions.¹⁵⁷

Public and marketplace perception.

97. The treatment of Fuse and AT&T-affiliated networks in the press also demonstrates that the two target the same demographic. A plethora of news stories lump Fuse and the AT&T networks together and describe them as appealing to the same viewers. In February 2019, Deadline wrote about a Television Critics Association panel focused on adult cartoons, which featured executives from Fuse Media, Adult Swim, and TBS.¹⁵⁸ And just last

154 *Id.*

¹⁵⁵ *Id.*; Sklar Decl. ¶ 26.

¹⁵⁶ Lopez Decl. ¶ 52.

¹⁵⁷ Sklar Decl. ¶ 26.

¹⁵⁸ Lisa de Moraes, *Animation Execs Ponder ‘The Simpsons,’ Suspension Of Disbelief, Tackling “Toxic” Fans – TCA, Deadline* (Feb. 9, 2019), <https://deadline.com/2019/02/animation-the-simpsons-rick-morty-toxic-fans-tca-1202553476/>.

month, CableFax wrote about the focus of both Fuse and AT&T affiliated networks on election-related programming.¹⁵⁹ The article highlighted Fuse Media's history of election coverage, and its effort to provide its diverse audience with election-related information. The article also discussed HBO Max's related initiative—the offering of a free viewing of election-related programming that emphasized the power of a vote.

Comparison across other metrics.

98. Just as important, the programming of Fuse and that provided by AT&T-affiliated networks are in fact comparable under a number of different metrics. The programming of Fuse is comparable to that offered by AT&T affiliates in terms of [[BEGIN CONFIDENTIAL]]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]¹⁶⁰

Advertisers.

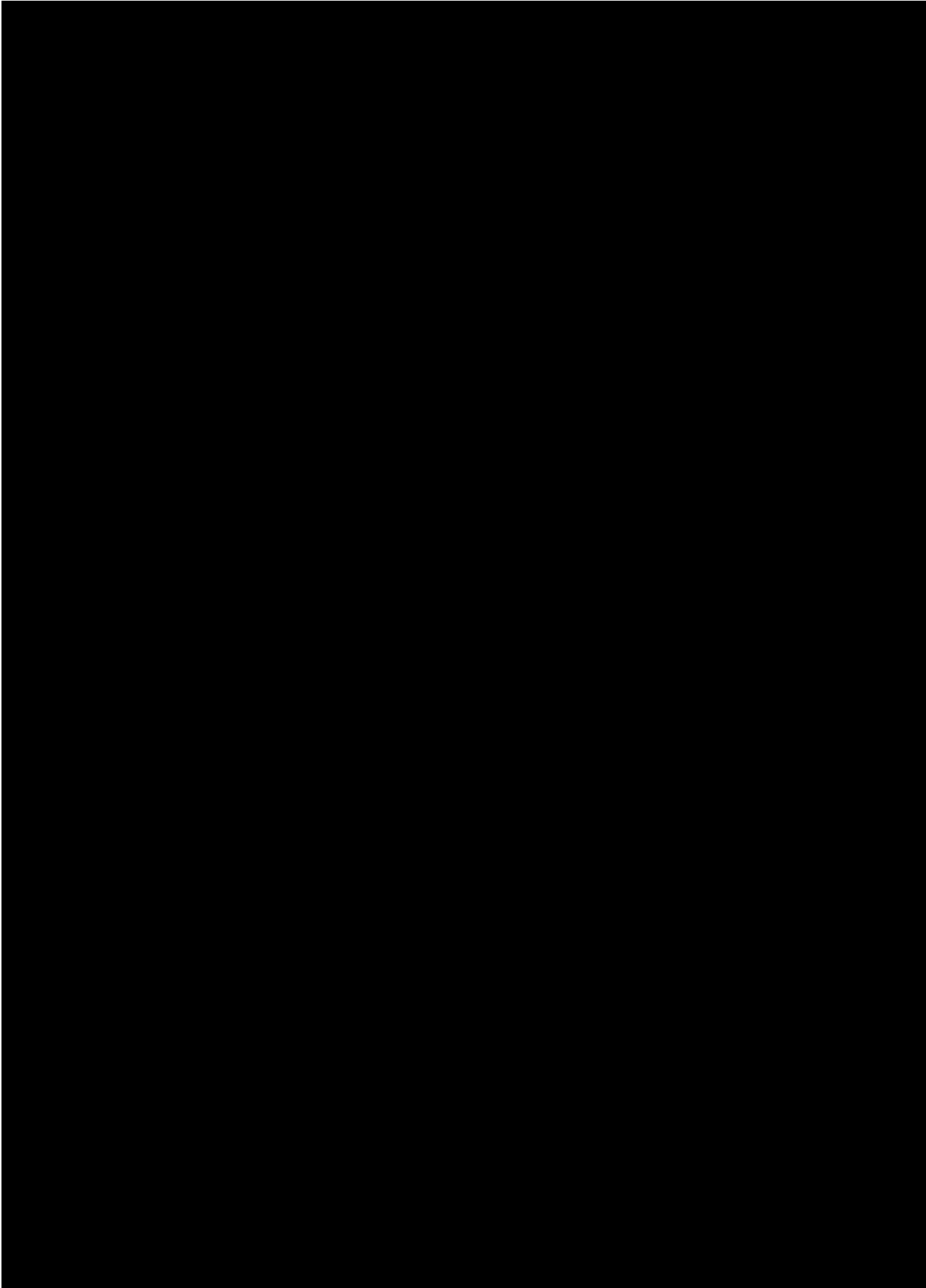
99. Fuse competes directly with AT&T's programming affiliates for advertising dollars. Advertising time on many Fuse shows is a substitute for time on comparable AT&T-affiliated network shows in the eyes of many advertisers. It is therefore no surprise that, as Ms. Lopez testifies, Fuse shares several key advertisers with TBS, TNT, Adult Swim, and TruTV.¹⁶¹ In fact, all of the largest Fuse advertisers in the following list also purchase advertising on TBS, Adult Swim, and/or TruTV. [[BEGIN CONFIDENTIAL]]

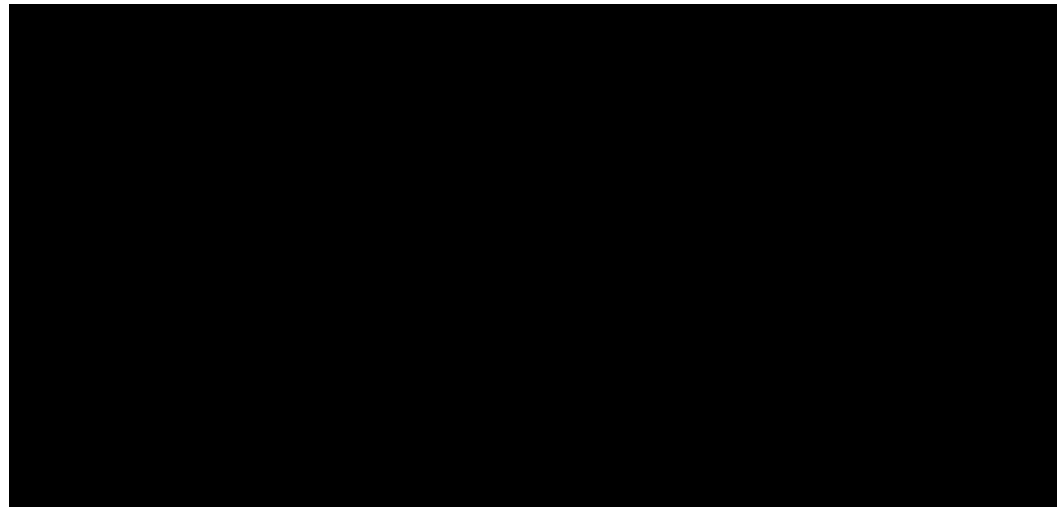
[REDACTED]

¹⁵⁹ Cablefax Staff, *Get Out the Vote*, Cablefax (Nov. 2, 2020), <https://www.cablefax.com/programming/get-out-the-vote-2>.

¹⁶⁰ Lopez Decl. ¶ 54.

¹⁶¹ *Id.* ¶ 55.





[[END CONFIDENTIAL]]¹⁶²

VII. SIMILARLY SITUATED STATUS IS THE ONLY EXPLANATION FOR AT&T'S CHANGE OF POSITION

100. The Brattle Group confirms in its testimony the similarly situated status of Fuse and AT&T's affiliated programming and networks. The Brattle Group also brings additional proof in support of that status: the change in AT&T's behavior toward Fuse post-vertical integration. In Brattle Group's words:

The availability of this affiliated similarly situated programming provides AT&T with economic motivation to discriminate against Fuse. Specifically, AT&T is able to avoid paying carriage fees (except through transfer pricing accounting) for programming and also realize additional benefits through increased advertising by using its own (affiliated) programming, rather than contracting with an outside party (Fuse) and trying to channel Fuse's audience to its affiliated networks. The presence of such economically beneficial programming armed AT&T with a superior bargaining position, thereby enabling it to avoid negative economic impacts and secure benefits from terminating carriage of Fuse. AT&T did not enjoy such a position prior to AT&T's acquisition of the Turner channels.¹⁶³

¹⁶² *Id.*

¹⁶³ Brattle Group Decl. ¶ 6.

101. As the Brattle Group explains: “In simple parlance, a test to determine whether Fuse programs and AT&T’s affiliated networks are similarly situated involves whether AT&T can ‘have its cake and eat it too.’”¹⁶⁴

102. The Brattle Group continues: “In other words, the decisive change that has caused AT&T to change its treatment of Fuse appears to be AT&T’s becoming vertically integrated.”¹⁶⁵

103. In this regard, Fuse Media notes that the question of whether AT&T’s conduct is based on non-discriminatory business reasons is not either a necessary or an appropriate part of the Bureau’s consideration at the *prima facie* stage of the inquiry. The Commission’s own rules and precedent are clear on the elements of a *prima facie* case, and non-discriminatory business reasons are not one of them.¹⁶⁶ In any event, Fuse Media does not believe that the eviction of Fuse programming from AT&T’s platforms would make any business sense for AT&T if it was not for the elephant in the room where program carriage decisions are made—AT&T’s integration with programmers against which Fuse competes. The fact that AT&T *has* made a

¹⁶⁴ *Id.* ¶ 9.

¹⁶⁵ *Id.* ¶ 21.

¹⁶⁶ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i) (listing “genre, ratings, license fee, target audience, target advertisers, target programming, and other factors” as factors in establishing whether “video programming” is similarly situated); *see also* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order*, 9 FCC Rcd. 2642, 2652 ¶ 24 (1993) (“1993 Second Program Carriage Order”); *Game Show Network, LLC v. Cablevision Systems Corp.*, *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 27 FCC Rcd. 5113, 5132 ¶ 28 n.166 (2012); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 25 FCC Rcd. 14149, 14161 ¶ 19 n.101 (2010). The Bureau has misapplied the *Tennis Channel* decision of the D.C. Circuit; there, non-discriminatory business reasons were relevant because the proceeding had undergone a full factfinding stage before an Administrative Law Judge. *See Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 983-84 (D.C. Cir. 2013).

renewal offer to Fuse Media, [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] implies an admission by AT&T that the carriage of Fuse is still beneficial to AT&T. [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]]

VIII. AT&T HAS DISCRIMINATED AGAINST FUSE’S PROGRAMMING IN FAVOR OF THE PROGRAMMING OF AT&T’S AFFILIATED NETWORKS

104. AT&T has discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, and conditions for carriage of these vendors’ programming. Specifically, AT&T has discriminated against the programming of Fuse and in favor of the similarly situated programming of TBS, TNT, Adult Swim, TruTV, and CNN.

A. AT&T Has Proposed Carriage Terms Less Favorable Than Those Received by AT&T’s Affiliated Programmers

105. Despite a carriage relationship of over fifteen years, AT&T failed to respond to Fuse Media’s renewal proposal over a period of almost four months. Fuse Media made a carriage extension presentation to AT&T back in August 2020.

106. On September 18, 2020, Fuse Media followed up by sending a draft carriage extension proposal and email highlighting key business terms in that proposal, including [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]] During subsequent phone calls on October 8, 2020 and October 21, 2020, AT&T steadfastly refused to negotiate the business terms, limiting discussions only to ancillary rights provisions and failing to provide language or respond to Fuse Media’s language. AT&T had initially agreed to send such provisions, as well as a response to the proposed business terms; it never did. Repeatedly, Fuse Media’s attempts to negotiate

continued carriage have been rebuffed. When it finally came, AT&T's proposal did nothing to cure the discrimination.¹⁶⁷

107. AT&T made a counteroffer to Fuse Media on December 1, 2020. [[BEGIN
CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] AT&T's treatment of Fuse's programming is less favorable than AT&T's treatment of these affiliated networks' programming. AT&T has negotiated, and granted, broad distribution of its networks that are similarly situated to Fuse, across AT&T's four distribution platforms: DIRECTV, AT&T TV, U-Verse, and the online streaming platform AT&T TV Now. DIRECTV offers four English-language packages (from basic to most expensive)—Entertainment, Choice, Ultimate, and Premier—and one Spanish-language package, Optimo Más. AT&T TV offers four English-language packages (from basic to most expensive)—Entertainment, Choice, Xtra, Ultimate, and Premier—and four Spanish-language packages (from basic to most expensive)—Más Latino, Optimo Más, Más Ultra, Lo Máximo. TBS, TNT, CNN, TruTV, and Adult Swim are offered on all eight of the English-

¹⁶⁷ Lopez Decl. ¶ 57.

¹⁶⁸ *Id.* ¶ 58.

language packages. TBS, TNT, CNN, and Adult Swim are also carried on AT&T TV's Spanish-language Optimo Más package, as well as all of DIRECTV's Spanish-language packages except Más Latino. TruTV is carried on DIRECTV's Lo Máximo package.¹⁶⁹

108. These affiliated networks are also broadly carried on the U-Verse and AT&T TV Now platforms. U-verse TV is no longer available for new signups, but offers seven packages: U-family, U200, U200 Latino, U300, U300 Latino, U450, U450 Latino. TBS, TNT, CNN, truTV, and Adult Swim are offered on all packages except U-Family. And AT&T TV Now offers eight packages for streaming (from basic to most expensive): Plus, Max, Optimo Más, Entertainment, Choice, Xtra, Ultimate, Premier. TBS, TNT, CNN, and Adult Swim are offered on all packages, while TruTV is offered on all packages except for the Spanish-language Optimo Más package.¹⁷⁰

B. AT&T's Proposed Rates Are Vastly Lower Than Those Paid to AT&T Affiliates

109. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶⁹ *Id.*

¹⁷⁰ *Packages*, AT&T TV Now, <https://www.atttvnow.com/#packages> (last visited Dec. 8, 2020).

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

IX. AT&T’S DISCRIMINATORY BEHAVIOR HAS UNREASONABLY RESTRAINED FUSE MEDIA’S ABILITY TO COMPETE FAIRLY

110. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] With audience consumption of video programming at an all-time high, the most desirable talent, producers, writers, and directors will choose to contract with networks with broader national exposure. The loss of distribution on AT&T would significantly impair Fuse Media’s ability to attract and retain talent of this kind. In the case of the social justice documentaries featured by Fuse Media in particular, which are aired by very few networks, the filmmakers may choose to feature their programming on CNN, to Fuse Media’s even further detriment.¹⁷³

111. Fuse Media will also be significantly hampered in its ability to attract advertisers.

[[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷¹ Lopez Decl. ¶ 60.

¹⁷² *Id.*

¹⁷³ *Id.* ¶ 61.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END
CONFIDENTIAL]]¹⁷⁴

112. Indeed, the loss of revenue from both affiliate and ad sales streams due to reduced distribution would seriously affect Fuse Media’s ability to fund off-channel marketing and advertising to drive awareness and content sampling, creating a spiral effect. [[BEGIN
CONFIDENTIAL]] [REDACTED]

[REDACTED]

[[END CONFIDENTIAL]] In short, discontinuance of carriage on AT&T will threaten Fuse Media’s very existence as a network, and will do so in the short term.¹⁷⁵

**COUNT I:
Discrimination on the Basis of Affiliation**

113. Complainant Fuse Media repeats and re-alleges each and every allegation contained in paragraphs 39-112 of this Complaint.

114. By virtue of the acts described above, AT&T has discriminated against Fuse Media by refusing to carry Fuse Media programming on comparable terms and conditions as

¹⁷⁴ *Id.* ¶ 62.

¹⁷⁵ *Id.* ¶ 63.

programming by AT&T affiliated programmers, thereby violating Section 616, 47 CFR § 76.1301(c).

COUNT II:
Unreasonable Restraint to Fuse Media's Ability to Compete Fairly

115. Complainant Fuse Media repeats and re-alleges each and every allegation contained in paragraphs 39-112 of this Complaint.

116. By virtue of the acts described above, AT&T has unreasonably restrained Fuse Media's ability to compete fairly.

X. PRAYER FOR RELIEF

Complainant Fuse and FM respectfully requests that the Commission:

- (a) find AT&T in violation of 47 C.F.R. § 76.1301(c);
- (b) enjoin AT&T from further program carriage discrimination;
- (d) order AT&T to carry Fuse and FM on equitable terms that do not unreasonably restrict Fuse and FM's ability to compete fairly, as determined by the Media Bureau; and
- (e) order any other relief that the Commission may deem appropriate.

Respectfully submitted,



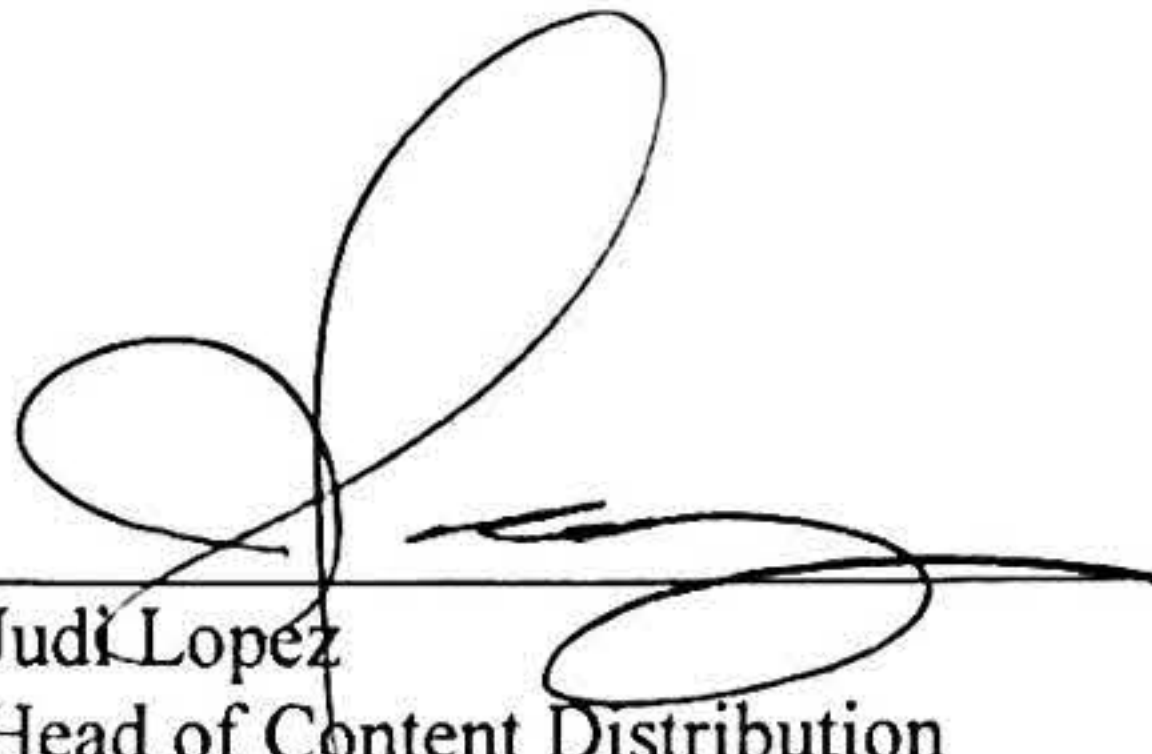
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Counsel to Fuse, LLC and FM Networks, LLC

December 11, 2020

VERIFICATION OF JUDI LOPEZ

I, Judi Lopez, have read Fuse Media's Program Carriage Complaint in this matter, and state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. It is not interposed for any improper purpose.



Judi Lopez
Head of Content Distribution
Fuse, LLC and FM Networks, LLC

Dated: December 11, 2020

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on December 11, 2020, I caused a copy of the foregoing Confidential Program Carriage Complaint to be served by overnight delivery, and a copy of the redacted version thereof electronically filed with the Federal Communications Commission on this day to be served by overnight delivery and electronic mail, upon:

Bruce Byrd
Senior Vice President and Assistant General Counsel
AT&T Communications
208 S. Akard St.
Dallas, Texas, 75202
g00130@att.com

/s/Matthew R. Friedman
Matthew R. Friedman

EXHIBIT 1

Redacted in Its Entirety

EXHIBIT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
FUSE, LLC,)	File No. CSR-____-P
and)	
FM NETWORKS, LLC,)	
Complainants,)	
)	
v.)	
)	
AT&T INC.,)	
DIRECTV, LLC)	
and)	
AT&T SERVICES, INC.,)	
Defendants.)	

DECLARATION OF JUDI LOPEZ

I, Judi Lopez, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge or based on information provided to me, in connection with the program carriage complaint of Fuse, LLC (“Fuse”) and FM Networks, LLC (“FM”) (together, “Fuse Media”) against AT&T Inc., DIRECTV, LLC (“DIRECTV”), and AT&T Services, Inc. (together, “AT&T”).

2. I am currently the Head of Content Distribution, Partnership Marketing, and Advocacy for, and one of the Minority Management Owners of, Fuse Media. In this capacity, I lead all distribution strategy, carriage negotiations, and partner marketing initiatives for Fuse Media’s linear networks, Fuse and FM, across all platforms. I also oversee all relationships and initiatives with Latino organizations, such as Unidos US, Hispanic Federation, and NHMC, as well as public officials at the federal and state level. I have 30 years’ experience executing cutting edge multiplatform content distribution agreements, eleven with Fuse Media. Prior to

joining Fuse Media, I worked in a similar capacity at the Walt Disney Company and AMC Networks. I have a degree from the California State Polytechnic University—Pomona.

3. Fuse Media is a Latino-owned, cross-platform entertainment media brand that creates empowering, multi-cultural content and experiences for a multiethnic millennial and GenZ audience.¹ Fuse Media is independently owned and operated. Fuse Media is unaffiliated with any MVPD.

4. Fuse Media owns two cable networks, Fuse, LLC (“Fuse”) and FM Networks, LLC (“FM”). Fuse provides general entertainment and lifestyle programming targeted to multicultural and multiethnic young adults.² FM features music programming targeted to millennials.³ An important part of Fuse Media’s mission is to serve the Latino audience, a historically underserved audience, with authentic representation of all aspects of their lives and Latino culture. Fuse Music is the rebranded version of NuvoTV after the merger of Fuse and NuvoTV in 2015.⁴ Fuse and FM are carried by multiple large cable and satellite multichannel video programming distributors (“MVPDs”), including DIRECTV/AT&T, DISH Network, Charter, Altice (Cablevision and Suddenlink), and Frontier, as well as online video distributors (“OVDs”), such as Sling TV and Fubo TV. [[BEGIN CONFIDENTIAL]] [REDACTED]

¹ About, Fuse TV, <https://www.fuse.tv/about> (last visited Nov. 27, 2020).

² *Fuse (TV channel)*, Wikipedia, [https://en.wikipedia.org/wiki/Fuse_\(TV_channel\)](https://en.wikipedia.org/wiki/Fuse_(TV_channel)) (last visited Nov. 27, 2020).

³ R. Thomas Umstead, *Hilary Ready to Light Up a New ‘Fuse’*, Multichannel News (Sept. 28, 2015), <https://www.nexttv.com/news/hilary-ready-light-new-fuse-394097>.

⁴ R. Thomas Umstead, *Upfronts 2015: Nuvo TV to Meld into Fuse in Q3*, Next TV (Mar. 4, 2015), <https://www.nexttv.com/news/upfronts-2015-nuvo-tv-meld-fuse-q3-388505>.

⁵ Nielsen Media Research (11/30/20-12/27/20), Cable Network Traditional TV Coverage Area Household Universe Estimates for December 2020.

⁶ Veronica Villafañe, *Latino-Led Management Team Acquires Controlling Interest In Fuse Media*, Forbes (Nov. 19, 2020), <https://www.forbes.com/sites/veronicavillafane/2020/11/19/latino-led-management-team-acquires-controlling-interest-in-fuse-media/>.

I. THE FUSE MEDIA-AT&T RELATIONSHIP.

6. Until recently, Fuse Media's relationship with AT&T had been a productive one. AT&T and Fuse Media first entered into an agreement for carriage of the Fuse network on August 7, 2006. This agreement has been renewed multiple times.

7. While AT&T has carried Fuse since the mid-2000s, DIRECTV, before it merged with AT&T, entered into an agreement to carry the Fuse network on December 31, 2014.

8. On July 24, 2015, AT&T officially acquired DIRECTV after obtaining the required regulatory approvals.⁷

9. Shortly after AT&T acquired DIRECTV, Fuse Media entered into an agreement with AT&T and DIRECTV on January 8, 2016 to govern the carriage of the FM network. This agreement was amended on June 30, 2016. AT&T carries Fuse and FM on packages with lower penetration than those AT&T carries its similarly situated affiliated programming.

10. [[BEGIN CONFIDENTIAL]]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END

CONFIDENTIAL]] Fuse programming is now carried on DIRECTV's Choice, Ultimate, and Premier packages, and U-Verse's U200, U200 Latino, U300, U300 Latino, U450, and U450 Latino packages. By comparison, AT&T's affiliates TBS, TNT, Adult Swim, TruTV, and CNN all enjoy broader distribution—they are at a minimum also included in DIRECTV's

⁷ Press Release, *AT&T Completes Acquisition of DIRECTV*, AT&T (July 24, 2015), https://about.att.com/story/att_completes_acquisition_of_directv.html.

Entertainment and Lo Máximo packages. Indeed, AT&T's favoritism with respect to the penetration granted its affiliated programmers was demonstrated only recently: in May 2019, DIRECTV added Boomerang and Revolt to additional packages and gave new carriage to CNN International. Two of these three networks are AT&T's own affiliates.

II. AT&T'S ATTITUDE TOWARD FUSE MEDIA CHANGED POST-VERTICAL INTEGRATION.

11. In 2018, AT&T survived an antitrust challenge by the Department of Justice and consummated its acquisition of Time Warner Inc. In challenging the acquisition, the Department of Justice had expressed concern that, among other things, the two vertically integrated distributors, AT&T and Comcast, would tacitly coordinate with each other.⁸

12. Vertical integration seems to have caused a dramatic change in AT&T's attitude and behavior toward Fuse. Until 2018, AT&T and Fuse operated in the spirit of a constructive partnership. After consummation of the Time Warner deal, the relationship degenerated into questionable tactics, including contract breach allegations by AT&T that compelled Fuse to seek declaratory relief from the courts,⁹ and reached its nadir with AT&T's recent spurning of Fuse's renewal efforts and pleas.

13. The first possible indication of questionable conduct came in the [[BEGIN
CONFIDENTIAL]] [REDACTED]

⁸ Complaint, *United States v. AT&T*, Case No. 1:17-cv-02511, at 20-21 (Nov. 20, 2017) (“[T]he merger would increase the likelihood and effect of oligopolistic coordination, particularly among certain vertically integrated MVPDs. . . . AT&T/DirecTV and Comcast/NBCU, which together have almost half of the country’s MVPD customers, would have an increased incentive and ability to harm competition by impeding emerging online competitors that they consider a threat, and increasing the prices for the networks they own.”). AT&T is also subject to a consent decree stemming from its coordination with other MVPDs to boycott the Dodgers sports network in Los Angeles. See Final Judgment, *United States v. DIRECTV Group Holdings, LLC, et al.*, Case No. 2:16-cv-08150-MWF-E (Oct. 2, 2017).

⁹ That litigation was settled.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END

CONFIDENTIAL]]

III. FUSE MEDIA APPROACHES AT&T TO BEGIN NEGOTIATIONS FOR A RENEWAL.

14. The current agreements between Fuse Media and AT&T/DIRECTV expire on [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] Desiring to renew the agreements to better serve each party's needs, Fuse Media reached out to AT&T to set up a meeting.

15. The meeting was held on a WebEx call on August 27, 2020. During the meeting, Fuse Media made its annual media presentation describing the programming on the networks, marketing partnerships, and other topics.

16. On September 4, I followed up with AT&T by email, asking to schedule a meeting to discuss next steps.

17. That meeting occurred on September 10, 2020. During that meeting, the AT&T executives gave positive feedback on Fuse Media's presentation. Following the meeting, I emailed Mr. Ryan Smith and Ms. Dimple Simson, AT&T/DIRECTV's representatives, to promise delivery of Fuse Media's renewal proposal.

18. On September 18, 2020, I emailed both Mr. Smith and Ms. Simson the proposed renewal terms and renewal contract. These terms included [[BEGIN CONFIDENTIAL]]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

19. On September 28, 2020, not having heard from AT&T, I reached out to Mr. Smith and Ms. Simson to schedule a meeting to discuss the renewal offer. Mr. Smith explained he had been out of the office but offered to schedule a meeting.

20. On October 8, 2020, Mr. Art Marquez, also from Fuse Media, and I held a phone call with Mr. Smith and Belia Slattery to discuss the renewal terms. AT&T largely focused on [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

21. On October 13, 2020, Mr. Marquez reached out again to AT&T's Mr. Smith to schedule a meeting to discuss the renewal terms. The meeting was scheduled for October 20 (it would actually take place on October 21). In the run-up to the meeting, I requested [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]] I emphasized that I was sure Fuse Media would be comfortable with AT&T's language. AT&T had not yet provided those provisions.

22. At the October 21, 2020 call between AT&T and Fuse Media, the bulk of the discussion focused again on [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

23. Fuse Media worked on the [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] On November 3, 2020, I reached out to Mr. Smith to follow up on that language. Mr. Smith requested a few more days for evaluation.

24. On November 19, 2020, I emailed Mr. Smith and other AT&T executives to reiterate Fuse Media's desire to reach an amicable agreement. I reminded Mr. Smith that it had been nearly three months since the initial presentation, two months since Fuse Media had sent AT&T the draft extension language, and a month since Fuse Media and AT&T had last had a phone call. In that entire time, AT&T had failed to send a marked-up version of the draft extension, give any comments on the extension terms, or make any suggestion as to the timing for completion of a renewal. I referenced the 15-year relationship that had proceeded without difficulty. I requested that AT&T send a redline response to the extension agreement by November 24, 2020; in turn, Fuse Media promised to review and respond before the Thanksgiving break.

25. November 24, 2020 passed with no response from AT&T.

26. On November 25, 2020, Fuse Media sent a pre-filing notification letter to AT&T. In the letter, Fuse Media reiterated its desire to reach an amicable agreement without the need for litigation before the Commission.

27. At long last, Fuse Media's letter evidently precipitated action by AT&T. On December 1, 2020, AT&T provided Fuse Media with a counteroffer to its September 18, 2020 proposal. But the counteroffer was insultingly hollow. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

28. On December 3, 2020, I responded to AT&T. The response attached a proposal that emphasized [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] In my cover email, I explained the role Fuse Media plays in serving a very important demographic—bilingual and English-language Latinos—which make up over a fifth of DIRECTV's subscribers. I expressed concern that the result of AT&T's [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] would be to drop the last of the independent networks serving this demographic, noted Fuse Media's readiness to have productive conversations on the deal points, and requested a call for early in the following week to discuss.

29. On December 9, 2020, AT&T responded to state that they received Fuse's counterproposal and that the [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

30. AT&T has not responded to Fuse Media’s counterproposal, or my request for a call, to date. Nor has AT&T written anything in response to Fuse Media’s November 25, 2020 pre-filing notification letter to dispel the concerns about discriminatory treatment expressed in that letter.

IV. FUSE PROGRAMMING IS SIMILARLY SITUATED TO AT&T AFFILIATED PROGRAMMING

Genre.

31. Fuse features programming falling within the same genre as TBS, Adult Swim, TruTV, TNT, and CNN. TBS’s programming is predominantly composed of live-action sitcoms and movies. Fuse likewise features such live-action sitcoms and movies. Fuse’s full day genre composition has become increasingly comparable to TBS’s over the past four years. Fuse went from 100% music videos in 2015 to approximately 60% sitcom/movie mix by 2017, and has maintained that percentage today. Based on an analysis of October 2020 programming conducted by Fuse Media, 45% percent of Fuse’s programming today is sitcoms, while 65% of TBS’s programming is sitcoms. Both networks air popular syndicated sitcom programming that features well-known stars: “Everybody Hates Chris” (featuring Chris Rock); “Malcolm In The Middle” (featuring Bryan Cranston); and “The Mindy Project” (featuring Mindy Kaling) for Fuse, and “Seinfeld” (featuring Jerry Seinfeld); “Brooklyn Nine-Nine” (featuring Andy Samberg); and “Everybody Loves Raymond” (featuring Ray Romano) for TBS. The percentage of movie programming for Fuse and TBS is also similar—12% for Fuse and 18% for TBS. Fuse and TBS purchase their movie programming from the same distributors.

32. TBS, like Fuse, also features reality television programming. Both networks feature shows falling within at least three of the same reality television sub-genres. Both networks air lifestyle-oriented reality programming—the series “Lost Resort” for TBS, which

features nine strangers embarking on a self-discovery trip at a wellness retreat,¹⁰ and “Clothes Minded” for Fuse, a reality program in which young adults go on a journey of self-discovery.¹¹ Fuse and TBS both air comedic reality programming that highlights people with unusual jobs and skills—the Go-Big Show on TBS, and That White People Shit on Fuse.¹² Both networks also air reality television programming featuring celebrities in unusual situations. For TBS: Celebrity Show-Off.¹³ For Fuse: Made From Scratch and Struggle Gourmet.¹⁴ Additionally, Fuse and TBS each currently air series that focus on e-sports—Modern Day Gladiators and ELEAGUE, respectively. Both Fuse and TBS also air talk show series. Fuse offers “Like, Share, Dimelo,” hosted by Latina comedians Dee Nasty and Sasha Merci, which focuses on topics like politics, pop culture and dating.¹⁵ TBS, for its part, offers “Full Frontal with Samantha Bee,” which focuses on politics, as well as “Conan.”¹⁶

¹⁰ *About*, Lost Resort, TBS, <https://www.tbs.com/shows/lost-resort> (last visited Dec. 8, 2020).

¹¹ *Struggle Gourmet*, Fuse, <https://www.fuse.tv/shows/struggle-gourmet> (last visited Dec. 8, 2020); Etan Vlessing, *Fuse Media Acquires Transgender Makeover Series ‘Clothes Minded’ (Exclusive)*, Hollywood Reporter (Sept. 21, 2020), <https://www.hollywoodreporter.com/news/fuse-media-acquires-transgender-makeover-series-clothes-minded-exclusive>.

¹² *About*, Go-Big Show, TBS, <https://www.tbs.com/shows/go-big-show> (last visited Dec. 8, 2020); *That White People Shit*, Fuse, <https://www.fuse.tv/shows/that-white-people-shit> (last visited Dec. 8, 2020).

¹³ *About*, Celebrity Show-Off, TBS, <https://www.tbs.com/shows/celebrity-show-off> (last visited Dec. 8, 2020).

¹⁴ *Made From Scratch*, Fuse, <https://www.fuse.tv/shows/made-from-scratch> (last visited Dec. 8, 2020); *Struggle Gourmet*, Fuse, <https://www.fuse.tv/shows/struggle-gourmet> (last visited Dec. 8, 2020).

¹⁵ *Like, Share, Dimelo*, Fuse, <https://www.fuse.tv/shows/like-share-dimelo/BroKjPn1VT8> (last visited Dec. 9, 2020).

¹⁶ *Full Frontal with Samantha Bee*, TBS, <https://www.tbs.com/shows/full-frontal-with-samantha-bee> (last visited Dec. 9, 2020); *Conan*, TBS, <https://www.tbs.com/shows/conan> (last visited Dec. 9, 2020).

33. Fuse, Adult Swim, and TBS are also similarly situated because they feature programming falling within the adult animation genre. Fuse has become increasingly focused on creating and featuring a mix of original adult animation. These shows include Sugar & Toys, Hollywood Puppet Shit Show, and original quirky 15-minute live action sitcoms (Ming's Dynasty, WTF Baron Davis). Adult Swim's programming is composed almost entirely of adult cartoons and quirky 15-minute live-action sitcoms, which are featured only in the evening, night, and early morning hours. As for TBS, it features adult cartoons American Dad, Bob's Burgers, Family Guy, Final Space, Storyville, and Tarantula. It is my understanding that Fuse and Adult Swim are the only networks featuring live action sitcoms in the 15-minute format.

34. Fuse and TruTV are both entertainment networks that air comedic programming. Comedic programming featured on Fuse shares the same, narrow focus as comedic programming on TruTV. One example is a recent shared focus on comedic programming revolving around food, with TruTV following Fuse's lead. For two years, Fuse has aired "Fluffy's Food Adventures," which follows stand-up comedian Gabriel "Fluffy" Iglesias on his culinary trips around the country,¹⁷ in addition to the previously mentioned Made From Scratch and Struggle Gourmet series. TruTV rushed to join: it recently announced the upcoming cooking competition "Fast Foodies"—advertised as a tongue-in-cheek cooking competition featuring celebrities.¹⁸ Both Fuse and TruTV also air programming that features NBA basketball players. Fuse's "WTF Baron Davis" revolves around the unorthodox mentorship of social media phenom BDot

¹⁷ *Fluffy's Food Adventures*, Fuse, <https://www.fuse.tv/shows/fluffy-s-food-adventures/EqONBrAg7fKj> (last visited Dec. 9, 2020).

¹⁸ Press Release, *truTV Serves Up Comedic Cooking Competition Series "Fast Foodies"*, Warner Media (Oct. 28, 2020), <https://pressroom.warnermedia.com/na/media-release/trutv/trutv-serves-comedic-cooking-competition-series-fast-foodies>.

(Brandon Armstrong) by Baron Davis, a retired NBA All-Star.¹⁹ TruTV again has sought to emulate Fuse: it has just announced the greenlighting of “Double Cross with Blake Griffin,” a prank show that features NBA All-Star Blake Griffin.²⁰

35. TNT, like Fuse, is also an entertainment network. And while it was traditionally focused on drama programming, AT&T has placed an increased focus on reducing the distinctions among TNT, TBS, and TruTV, and has refocused TNT to extend to genres such as unscripted and reality television.²¹ The series “Shaq Life” is one representative example. Like Fuse and TruTV programming, “Shaq Life” focuses on an NBA star—Shaquille O’Neil—and falls within the reality genre, following Shaq around as he goes on tour as a DJ, trains for a boxing match, and raises his children.²² While TNT does not have a large concentration of sitcoms, it programs dramas with strong comedic content, such as “Claws,” “Franklin & Bash,” and “Librarians.”²³

36. Fuse and CNN, in turn, both feature programming in the documentary genre. Fuse’s award-winning and world-class Fuse Docs and Fuse Films series compete with original and acquired documentaries on CNN & HBO. Fuse Docs are sophisticated social issue-driven documentaries, similar to those found on CNN and HBO. Fuse and CNN have each aired

¹⁹ *WTF Baron Davis*, Fuse, <https://www.fuse.tv/shows/wtf-baron-davis/ywl1xz33wHJo> (last visited Dec. 9, 2020).

²⁰ Press Release, *truTV Scores a Slam Dunk With Series Order for Double Cross with Blake Griffin*, Warner Media (Oct. 1, 2020), <https://pressroom.warnermedia.com/na/media-release/trutv/trutv-scores-slam-dunk-series-order-double-cross-blake-griffin>.

²¹ Michael Schneider, *WarnerMedia Blurs the Line Between TNT and TBS as It Preps for Its Streaming Future*, *Variety* (May 15, 2019), <https://variety.com/2019/tv/news/warnermedia-tbs-tnt-snowpiercer-upfronts-1203215822/>.

²² *About, Shaq Life*, TNT, <https://www.tntdrama.com/shaq-life> (last visited Dec. 9, 2020).

²³ *See Shows*, TNT, <https://www.tntdrama.com/shows> (last visited Dec. 9, 2020).

documentaries about empowering females—Fuse’s “She Started It” and CNN’s “Girl Rising” and “We Will Rise”; the failings of the American justice system—Fuse’s “It’s Criminal” and CNN’s “American Jail”; and personal stories of immigration—Fuse’s “Colossus” and “Indivisible” and CNN’s “Documented.” Fuse documentaries regularly compete with those of CNN for awards.

Target audience and programming.

37. Fuse and TBS also seek to attract diverse, multiethnic audiences. Fuse Media is under Latino ownership and management, and seeks to serve the Latino audience with authentic representation of all aspects of their lives and culture.²⁴ Fuse also strives to amplify voices in need of representation in an authentic way, and is committed to creating and acquiring powerful series, documentaries, and independent films that entertain and empower multicultural audiences.²⁵ TBS, for its part, holds itself out as committed to diversity in its programming, as early as 2010.²⁶ In 2014, TBS and TNT partnered with the Black List to increase diversity in their programming and writers’ rooms.²⁷ In 2018, Warner Media, which includes TBS, promised

²⁴ Veronica Villafañe, *Latino-Led Management Team Acquires Controlling Interest In Fuse Media*, Forbes (Nov. 19, 2020), <https://www.forbes.com/sites/veronicavillafane/2020/11/19/latino-led-management-team-acquires-controlling-interest-in-fuse-media/>.

²⁵ Jillian Morgan, *Fuse Sets Music-Focused Docs as Part of Summer Programming*, Realscreen (June 10, 2020), <https://realscreen.com/2020/06/10/fuse-sets-music-focused-docs-as-part-of-summer-programming/>.

²⁶ Megan Angelo, *At TBS, Diversity Pays Its Own Way*, N.Y. Times (May 28, 2010), <https://www.nytimes.com/2010/05/30/arts/television/30tbs.html> (“In a television world where ‘The Fresh Prince of Bel-Air’ and ‘The Cosby Show’ are distant memories, TBS has quickly become the home of minority-driven comedy.”).

²⁷ Mikey O’Connell, *The Black List Moves into TV with TNT and TBS Diversity Program*, Hollywood Reporter (Feb. 3, 2014), <https://www.hollywoodreporter.com/news/black-list-moves-tv-tnt-676709>.

to increase diversity in its programming and talent.²⁸ And earlier this year, TBS, TNT, and HBO held a pop-up experience at Sundance to “celebrate their commitment to multicultural storytelling, creators and audiences.”²⁹

38. Fuse is a better conduit into the living rooms of that audience than AT&T’s affiliated programming. As I have pointed out to AT&T, even in Spanish-dominant households, about 75% of the programming watched is in English. While diverse content and audiences are stated priority goals for the Turner networks as well, including TBS, Adult Swim, TruTV and TNT, and this is one of the many factors making the Turner and Fuse programming similarly situated, at present the goal seems largely aspirational for Turner, and Fuse Media has achieved it to a significantly greater extent. Fuse is better attuned to speak to that audience than the Turner networks.

39. Fuse has also competed for content and talent with AT&T’s affiliated networks. Celebrity talent that is booked on Fuse programs is often also booked on TBS, including Action Bronson, Diplo, and Snoop Dogg. And Fuse’s “Ready Or Not” is a follow-up to its filmmaker’s previous documentary, HBO’s “Running with Beto.” Both shows follow underdog progressive candidates running for office. Furthermore, the shows aired by Fuse often rely on the same screenwriters as those aired by the AT&T affiliated networks. For example, Fuse’s current animated series, *Sugar & Toys*, now in its second season, is created, produced, and written by

²⁸ Patrick Hipes, *WarnerMedia Unveils Company-Wide Diversity and Inclusion Policy, From Film to TV*, Deadline (Sept. 5, 2018), <https://deadline.com/2018/09/warner-bros-hbo-turner-diversity-inclusion-policy-michael-b-jordan-warnermedia-1202457597/> (“AT&T’s newly branded WarnerMedia, which encompasses Warner Bros, Turner and HBO, has taken the wraps off a companywide policy outlining its commitment to diversity and inclusion both in front and behind the camera on its film, TV and digital output.”).

²⁹ Dino-Ray Ramos, *HBO, TNT and TBS Team for Sundance ‘Our Stories to Tell’ Multicultural Pop-Up Experience*, Deadline (Jan. 17, 2020), <https://deadline.com/2020/01/hbo-tnt-tbs-sundance-film-festival-our-stories-to-tell-diversity-inclusion-representation-1202834003/>.

Brian Ash and Carl Jones, who between them have written and produced seven different programs appearing on AT&T affiliated networks: The Boondocks (Adult Swim); Black Dynamite (Adult Swim); Freaknik: The Musical (Adult Swim); The Last O.G. (TBS); Young Love (HBO Max); The Jellies (Adult Swim); and Lazor Wulf (Adult Swim). This overlap of talent and the creative sensibilities underlying Sugar & Toys and so many Adult Swim shows suggests there is good reason [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

Turner ads on Fuse.

40. There is probably no stronger proof that two programmers are similarly situated than evidence that one has to “steal” the viewers of the other. This is precisely what the Turner networks have been doing by purchasing ads on Fuse. Specifically, [[BEGIN

CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

Competition for the same content.

41. Also important is the competition between Fuse and the AT&T affiliate networks for the same content. In one telling example, Fuse aired five seasons of television programming in partnership with Complex, a lifestyle publication and brand, between 2017 and 2019, including Complex’s highly successful Hot Ones series. Subsequently, AT&T’s TruTV obtained

the intellectual property rights to Complex's Hot Ones and expanded that programming into a full series and different format (a 5-8 minute segment within the "Complex x Fuse" program on Fuse versus 30-minute format on TruTV).

Competition for the same awards.

42. A key selling proposition for any successful network, including perhaps most prominently AT&T's affiliates CNN and HBO, is the number of awards it wins. This is critical for a brand built on smart, quality programming for an elite audience. The Peabody Awards are widely regarded as the most prestigious awards in television. HBO has won a Peabody Award for a documentary every year for at least the past ten years except for 2017, which is the year Fuse won its first Peabody for the Fuse Doc 'Indivisible'.

43. Fuse started aggressively pursuing prestige and diversity awards beginning in 2017 with originals and new franchise Fuse Docs. The results have been impressive, and impressively fast. Ever since it got into the awards game in 2017, Fuse has garnered an impressive 25 nominations and wins for various prestige and diversity awards. See the following list, which details all the instances in which Fuse competed with AT&T affiliate networks, with Fuse in green and AT&T affiliate networks in blue.

2017 Imagen Awards

Best Variety or Reality Show

- America Latino (LATV Networks)
- Cesar Millan's Dog Nation (Nat Geo Wild; Leepson Bounds Entertainment for National Geographic)
- **WINNER: Fluffy Breaks Even** (Fuse TV; Arsonhouse Entertainment, B-17 Entertainment, Fluffy Shop Studios)
- **Real Time with Bill Maher** (HBO; HBO Entertainment in assoc. w/ Bill Maher Productions and Brad Grey Television)
- **The Real** (Telepictures Productions/Warner Bros Domestic Television Distribution)
- The Riveras (Univision; Blank Paige Productions)

2017 NAMIC Vision Awards

Comedy

- ABC – black-ish
- Fuse – Fluffy Breaks Even
- HBO – Ballers
- **WINNER:** HBO – Insecure
- Starz – Survivor’s Remorse

2018 NAMIC Vision Awards

Documentary

- 30 for 30: Celtics vs Lakers: The Best of Enemies – ESPN
- **WINNER:** Baltimore Rising – HBO
- Indivisible – Fuse
- Rock and a Hard Place – HBO
- Whitney. “Can I Be Me” – Showtime
- The 44th President: In His Own Words – HISTORY

2018 Imagen Awards

Best Variety or Reality Show

- MasterChef Latino (Telemundo; Endemol Shine Boomdog)
- Felipe Esparza: Translate This (HBO; HBO Entertainment in association with Felipe’s World and Unreel Media)
- George Lopez: The Wall, Live from Washington, D.C. (HBO; HBO Entertainment in association with Travieso Productions and Dakota North Entertainment)
- Fluffy’s Food Adventures (Fuse; Arsonhouse Entertainment, B-17 Entertainment, Fluffy Shop Studios)
- **WINNER:** Pati’s Mexican Table (WETA/American Public Television; Co-production of Mexican Table LLC, WETA Washington DC, and FRANK)

2019 Imagen Awards

Best Variety or Reality Show

- **WINNER:** Hip-Hop Houdini (Fuse; 7Beyond)
- Last Week Tonight (HBO; HBO Entertainment in association with Sixteen String Jack Productions and Avalon Television)
- Mexican Dynasties (Bravo; Shed Media and Campanario Entertainment)
- Mira Quien Baila: All Stars (Univision; Endemol Shine Boomdog, Univision Studios)
- Pati’s Mexican Table (WETA Washington, DC / American Public Television; Mexican Table, LLC, WETA Washington, DC, FRANK. and Switchblade)
- World of Dance (NBC; Universal Television Alternative Studio in association with Nuyorican Productions and World of Dance)

2019 NAACP Image Awards

Outstanding Documentary (Television)

- Hope & Fury: MLK, The Movement and the Media (NBC)
- King in the Wilderness (HBO)
- **WINNER:** Say Her Name: The Life and Death of Sandra Bland (HBO)
- Shut Up & Dribble (Showtime)
- Time For Ilhan (Fuse)

2019 NAMIC Vision Awards

Digital Media – Short Form

- **WINNER:** 25 Influential American Muslims – CNN
- CNN ‘Impact Your World’ #ShowLove – CNN
- ESPN Features – SC Reportajes: Puños Eternos (Eternal Fists) – ESPN
- Glor’s Story – NBC Asian America
- Indivisible Cast Update: Where Are They Now? – Fuse

Documentary

- American Masters – Basquiat: Rage to Riches – Thirteen/WNET
- Into the Okavango – National Geographic
- **WINNER:** Rest in Power: The Trayvon Martin Story – Paramount Network
- Shut Up and Dribble – SHOWTIME Documentary Films
- Time for Ilhan – Fuse
- Traffic Stop – HBO
- We Are Not Done Yet – HBO

2020 Imagen Awards

Best Documentary

- Colossus (Fuse; Campanario, Perimeter Pictures)
- The First Rainbow Coalition (PBS; Latino Public Broadcasting, Nantes Media, LLC, Good Docs, ITVS)
- Home: Mexico (Apple TV+; Apple / MediaWeaver / Four M Studios / Altimeter Films)
- POV: The Silence of Others (PBS; Semilla Verde Productions, Lucernam Films, American Best Documentary | POV, Independent Television Service (ITVS) and Latino Public Broadcasting (LPB), in association with El Deseo, with funding from the Corporation for Public Broadcasting (CPB).)
- **WINNER:** Sea of Shadows (National Geographic; Terra Mater Factual Studios in association with Appian Way, Malaika Pictures, The Wild Lens Collective for National Geographic Best Documentary Films)
- Torn Apart: Separated at the Border (HBO; HBO Best Documentary Films in association with Talos Films)
- VOCES: Porvenir, Texas (PBS; Latino Public Broadcasting, PBS SoCal)

2020 NAMIC Vision Awards

Original Movie or Special

- Collisions – Fuse
- **WINNER:** I am Somebody’s Child: The Regina Louise Story – Lifetime
- Native Son – HBO
- O.G. – HBO

Target audience metrics.

44. Nielsen data demonstrates that the viewers of both Fuse and TBS skew female

[[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]] They also skew young. The median age for Fuse is [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] Fuse hones its content for younger viewers. It states that it provides “cultural-based content and experiences for a multicultural millennial and GenZ audience.”³⁰ Similarly, the Warner Media For Brands website emphasizes Adult Swim is “#1 with millennials 14 years in a row.”³¹

45. Most viewers of Fuse also watch TBS, TNT, and Adult Swim. According to Nielsen data [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

³⁰ Fuse.TV, Fuse Media, <https://www.fuse.tv/about> (last visited Dec. 9, 2020).

³¹ Entertainment and Emerging Consumers, WarnerMedia For Brands, <https://www.warnermediaforbrands.com/divisions/entertainment> (last visited Dec. 9, 2020).

46. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[[END CONFIDENTIAL]]

47. Viewer demographics for Fuse and AT&T affiliated programming also show striking similarities. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

Ratings.

48. Cost-adjusted ratings show that Fuse is comparable to the Turner networks.

While naturally much smaller than the Turner networks, here too, Fuse has managed to punch above its weight.

49. Even before any adjustment for the cost of each network is made, and even setting aside Nielsen's undercounting of independent programmers' audiences that is well-known in the industry, Fuse's ratings are in the same ballpark as those of a number of Turner networks.

Nielsen data for December 2018, the last month Fuse Media was carried by Comcast, show the popularity of Fuse's programming as compared to that of AT&T's affiliated networks. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

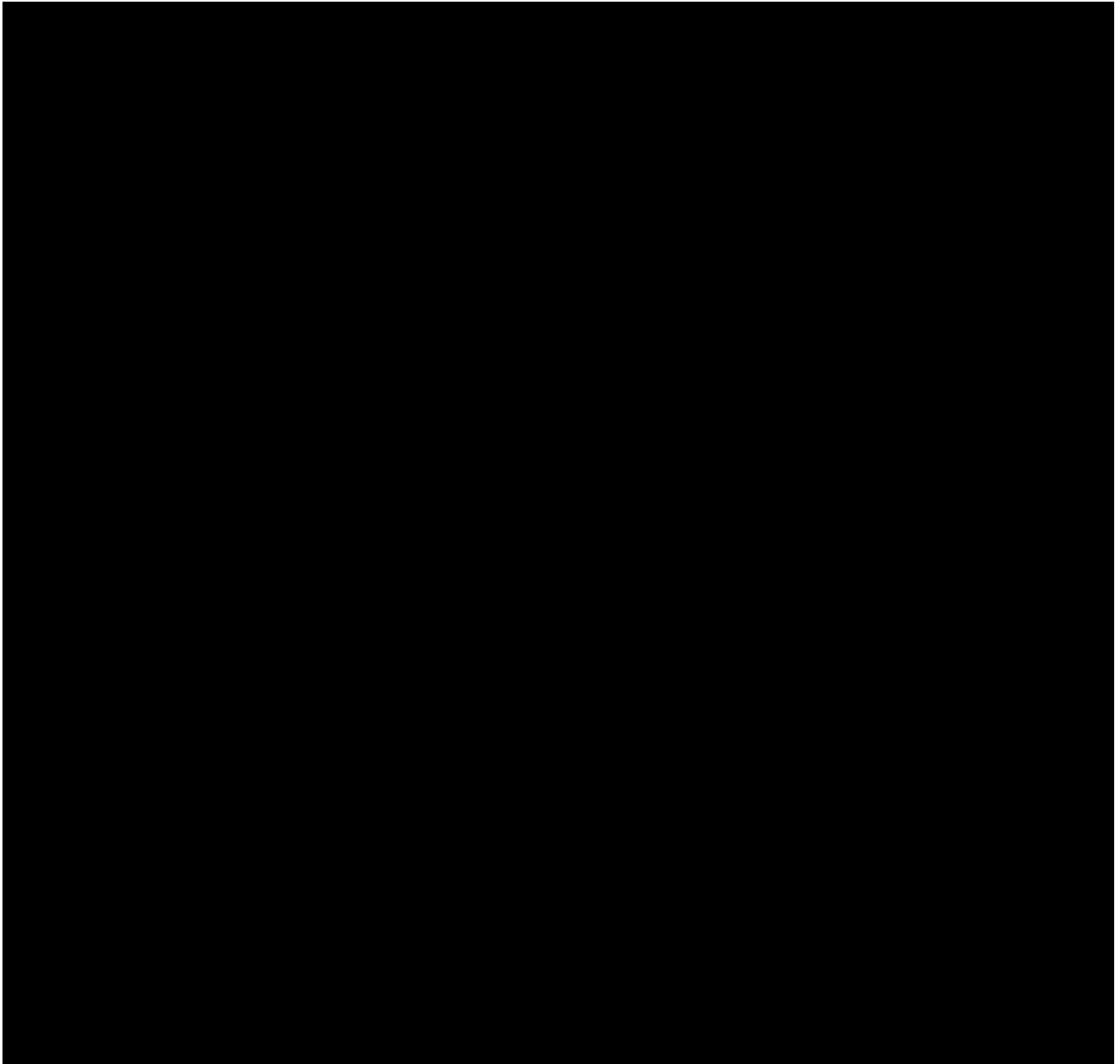
[REDACTED] [[END CONFIDENTIAL]] Representatives from

other independent networks have told me that they engaged in similar analyses and have come to the same conclusion.

50. Fuse's Nielsen ratings for November 2020 are down from December 2018 as a result of loss of distribution. This decrease is in large part a result of the loss of carriage on Comcast. These lower ratings are also consistent with the generally lower ratings of AT&T's

affiliated networks during that same period, with the exception of CNN, which primarily aired election coverage during an election.

51. The ratings of Fuse are comparable to those of the AT&T networks when adjusted on the basis of each network's reach and fees. Fuse has calculated the cost per rating point for Fuse and AT&T-affiliated networks, based on recent Kagan data on fees and Nielsen data on ratings, which is included in the table below. [[BEGIN CONFIDENTIAL]]



11/11/2016

Public and marketplace perception.

53. The treatment of Fuse and AT&T-affiliated networks in the press also demonstrates that the two target the same demographic. A plethora of news stories lump Fuse and the AT&T networks together and describe them as appealing to the same viewers. In February 2019, Deadline wrote about a Television Critics Association panel focused on adult cartoons, which featured executives from Fuse Media, Adult Swim, and TBS. And just last month, CableFax wrote about the focus of both Fuse and AT&T affiliated networks on election-related programming. The article highlighted Fuse Media’s history of election coverage, and its effort to provide its diverse audience with election-related information. The article also discussed HBO Max’s related initiative—the offering of a free viewing of election-related programming that emphasized the power of a vote.

Comparison across other metrics.

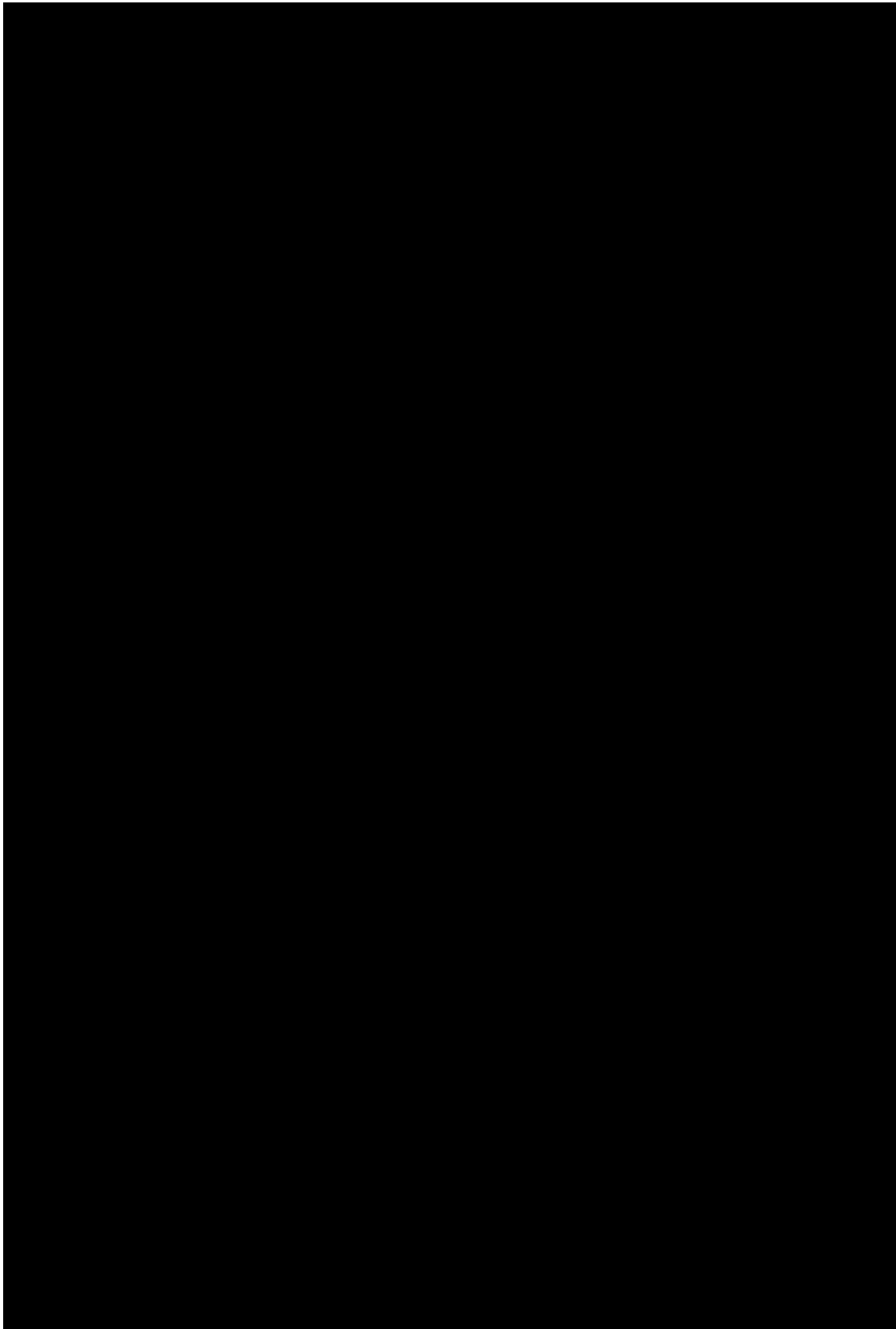
54. Just as important, the programming of Fuse and that provided by AT&T-affiliated networks are in fact comparable under a number of different metrics. According to Nielsen data, the programming of Fuse is comparable to that offered by AT&T affiliates in terms of [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

Advertisers.

55. Fuse competes directly with AT&T's programming affiliates for advertising dollars. Advertising time on many Fuse shows is a substitute for time on comparable AT&T-affiliated network shows in the eyes of many advertisers. At my direction, Fuse Media's Head of Ad Sales, Fernando Romero, pulled Fuse's advertising data for the past year. This data shows that Fuse shares several key advertisers with TBS, TNT, Adult Swim, and TruTV. In fact, all of the largest Fuse advertisers in the following list also purchase advertising on TBS, Adult Swim, and/or TruTV. [[BEGIN CONFIDENTIAL]]

[REDACTED]



[[END CONFIDENTIAL]]

V. AT&T HAS PROPOSED CARRIAGE TERMS LESS FAVORABLE THAN THOSE RECEIVED BY AT&T'S AFFILIATED PROGRAMMERS

56. Despite a carriage relationship of over fifteen years, AT&T failed to respond to Fuse Media's renewal proposal over a period of almost four months. Fuse Media made a carriage extension presentation to AT&T back in August 2020.

57. On September 18, 2020, Fuse Media followed up by sending a draft carriage extension proposal and email highlighting key business terms in that proposal, including

[[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]] During subsequent phone calls on October 8, 2020 and October 21, 2020, AT&T steadfastly refused to negotiate the business terms, limiting discussions only to ancillary rights provisions and failing to provide language or respond to Fuse Media's language. AT&T had initially agreed to send such provisions, as well as a response to the proposed business terms; it never did. Repeatedly, Fuse Media's attempts to negotiate continued carriage have been rebuffed. When it finally came, AT&T's proposal did nothing to cure the discrimination.

58. AT&T made a counteroffer to Fuse Media on December 1, 2020. [[BEGIN
CONFIDENTIAL]] [REDACTED]

██████████ [[END CONFIDENTIAL]] AT&T's treatment of Fuse's programming is less favorable than AT&T's treatment of these affiliated networks' programming. AT&T has negotiated, and granted, broad distribution of its networks that are similarly situated to Fuse, across AT&T's four distribution platforms: DIRECTV, AT&T TV, U-Verse, and the online streaming platform AT&T TV Now. I understand that DIRECTV offers four English-language packages (from basic to most expensive)—Entertainment, Choice, Ultimate, and Premier—and one Spanish-language package, Optimo Más. AT&T TV offers four English-language packages (from basic to most expensive)—Entertainment, Choice, Xtra, Ultimate, and Premier—and four Spanish-language packages (from basic to most expensive)—Más Latino, Optimo Más, Más Ultra, Lo Máximo. TBS, TNT, CNN, TruTV, and Adult Swim are offered on all eight of the English-language packages. TBS, TNT, CNN, and Adult Swim are also carried on AT&T TV's Spanish-language Optimo Más package, as well as all of DIRECTV's Spanish-language packages except Más Latino. TruTV is carried on DIRECTV's Lo Máximo package.

59. These affiliated networks are also broadly carried on the U-Verse and AT&T Now platforms. U-verse TV is no longer available for new signups, but offers seven packages: U-family, U200, U200 Latino, U300, U300 Latino, U450, U450 Latino. TBS, TNT, CNN, truTV, and Adult Swim are offered on all packages except U-Family. And AT&T TV Now offers eight packages for streaming (from basic to most expensive): Plus, Max, Optimo Más, Entertainment, Choice, Xtra, Ultimate, Premier. TBS, TNT, CNN, and Adult Swim are offered on all packages, while TruTV is offered on all packages except for the Spanish-language Optimo Más package.³²

³² *Packages*, AT&T TV Now, <https://www.atttvnow.com/#packages> (last visited Dec. 8, 2020).

A. AT&T's Proposed Rates Are Vastly Lower Than Those Paid to AT&T Affiliates

60. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

VI. AT&T'S DISCRIMINATORY BEHAVIOR HAS UNREASONABLY RESTRAINED FUSE MEDIA'S ABILITY TO COMPETE FAIRLY

61. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

With audience consumption of video programming at an all-time high, the most desirable talent, producers, writers, and directors will choose to contract with networks with broader national exposure. The loss of distribution on AT&T would significantly impair Fuse Media's ability to attract and retain talent of this kind. In the case of the social justice documentaries featured by Fuse Media in particular, which are aired by very few networks, the filmmakers may choose to feature their programming on CNN, to Fuse Media's even further detriment.

62. Fuse Media will also be significantly hampered in its ability to attract advertisers.

[[BEGIN CONFIDENTIAL]]

██████████ [[END CONFIDENTIAL]]

63. Indeed, the loss of revenue from both affiliate and ad sales streams due to reduced distribution would seriously affect Fuse Media's ability to fund off-channel marketing and advertising to drive awareness and content sampling, creating a spiral effect. [[BEGIN

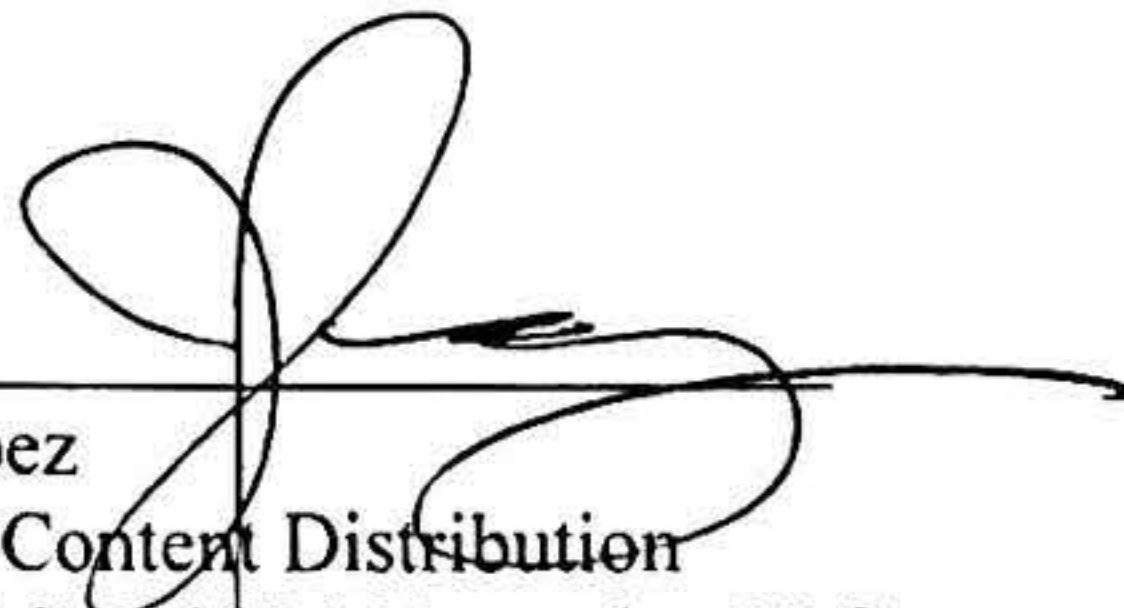
CONFIDENTIAL]]

[[END CONFIDENTIAL]] In short, discontinuance of carriage on AT&T will threaten Fuse Media's very existence as a network, and will do so in the short term.

* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on December 11, 2020



Judi Lopez
Head of Content Distribution
Fuse, LLC and FM Networks, LLC

EXHIBIT 3

Redacted in Its Entirety

EXHIBIT 4

Redacted in Its Entirety

EXHIBIT 5

Redacted in Its Entirety

EXHIBIT 6

Redacted in Its Entirety

EXHIBIT 7

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EXHIBIT 8

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EXHIBIT 9

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EXHIBIT 16

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EXHIBIT 17

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EXHIBIT 18

Redacted in Its Entirety

EXHIBIT 19

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
FUSE, LLC,)	File No. CSR-____-P
and)	
FM NETWORKS, LLC,)	
Complainants,)	
)	
v.)	
)	
AT&T INC.,)	
DIRECTV, LLC)	
and)	
AT&T SERVICES, INC.,)	
Defendants.)	

DECLARATION OF STEVEN SKLAR

I, Steven Sklar, being over 18 years of age, swear and affirm as follows:

1. I have significant experience in the program carriage marketplace, where multichannel video programming distributors (“MVPDs”) negotiate with video programmers for carriage of their content. I currently serve as Managing Member of S Squared Advisory, LLC, where I provide consulting and advisory services to media and telecommunications companies on, among things, content distribution and licensing. From 2005 until 2018, I worked at CenturyLink, most recently as Vice President, Video and Content Strategy. In this capacity, I negotiated programming rights agreements involving more than 100 networks and subscription video-on-demand services, and oversaw the development of CenturyLink’s video products, including Prism TV and CenturyLink Stream. I have also worked for programmers in connection with their dealings with MVPDs. I have thus been afforded intimate views on the industry from both sides of the negotiating table. This has equipped me well to compare the

motivations and actions of such a distributor with those of a distributor who has its own programming interests.

2. I have been asked by Fuse Media to offer my expert view on whether Fuse's programming is similarly situated to the programming on AT&T-affiliated TBS, TNT, Adult Swim, CNN, and TruTV; whether Fuse is a similarly situated network to TBS, TNT, Adult Swim, CNN, and TruTV; and whether AT&T's treatment of Fuse Media would unreasonably restrain Fuse Media's ability to compete fairly. My view is that the programming aired on Fuse is similarly situated to the programming aired on TBS, TNT, CNN, Adult Swim, and TruTV; Fuse is a similarly situated network to TBS, TNT, Adult Swim, and TruTV; and AT&T's treatment of Fuse Media would unreasonably restrain Fuse Media's ability to compete fairly.

I. FUSE PROGRAMMING IS SIMILARLY SITUATED TO AT&T AFFILIATED PROGRAMMING

3. I understand that the Federal Communications Commission's ("FCC" or "Commission") determination whether two networks provide similarly situated programming is based on a "combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."¹

4. I conclude that Fuse Media's programming is similarly situated to the programming offered by AT&T affiliates TBS, TNT, CNN, Adult Swim, and TruTV. Fuse is also a similarly situated network to TBS, TNT, TruTV, and TBS.

5. **Genre.** Fuse is a general entertainment network that features programming that is not only in the same genre as programming featured on TBS, Adult Swim, TruTV, TNT, and CNN, but often the same sub-genre. Fuse offers a compelling mix of sitcoms, animated sitcoms,

¹ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

docu-series, talk series, comedy/reality series, documentaries and movies. The range of programming genres Fuse offers overlaps genres programmed by TBS, Adult Swim, TruTV, TNT, and CNN, showing that Fuse competes with all of these AT&T affiliate networks.

6. Fuse, TBS, Adult Swim, and TruTV are all entertainment networks. Fuse and TBS in particular air programming falling within at least four genres: sitcoms, movies, reality television, and adult animated sitcoms.

7. The majority of the programming featured by Fuse and TBS fall within one of two genres: sitcoms and movies. I understand that 45 percent of Fuse's programming today is sitcoms, while 65 percent of TBS's programming is sitcoms. This programming for both networks is comprised of popular syndicated sitcom programming that features well-known stars: "Everybody Hates Chris" (featuring Chris Rock); "Malcolm In The Middle" (featuring Bryan Cranston); and "The Mindy Project" (featuring Mindy Kaling) for Fuse, and "Seinfeld" (featuring Jerry Seinfeld); "Brooklyn Nine-Nine" (featuring Andy Samberg); and "Everybody Loves Raymond" (featuring Ray Romano) for TBS.² The percentage of movie programming for Fuse and TBS is also similar—12% for Fuse and 18% for TBS.³ I understand that Fuse and TBS purchase their movie programming from the same distributors.⁴ The fact that the majority of content on Fuse and TBS is from the same two genres, sitcoms and movies, is another strong indication that these networks offer substantially similar programming.

8. Fuse and TBS also air programming falling within the reality television genre, and specific sub-genres within the reality genre specifically. Both networks air lifestyle-oriented

² Lopez Decl. ¶ 31.

³ *Id.*

⁴ *Id.*

reality programming—the series “Lost Resort” for TBS, which features nine strangers embarking on a self-discovery trip at a wellness retreat,⁵ and “Clothes Minded” for Fuse, a reality program in which young adults go on a journey of self-discovery.⁶ Fuse and TBS both air comedic reality programming that highlights people with unusual jobs and skills—the “Go-Big Show” on TBS, and “That White People Shit” on Fuse.⁷ Both networks also air reality television programming featuring celebrities in unusual situations. For TBS: “Celebrity Show-Off.”⁸ For Fuse: “Made From Scratch” and “Struggle Gourmet.”⁹ Additionally, Fuse and TBS each currently air series that focus on e-sports—“Modern Day Gladiators” and “ELEAGUE,” respectively. The similarities hardly end there: Both Fuse and TBS air talk show series. Fuse offers “Like, Share, Dimelo,” hosted by Latina comedians Dee Nasty and Sasha Merci, which focuses on topics like

⁵ *About*, Lost Resort, TBS, <https://www.tbs.com/shows/lost-resort> (last visited Dec. 8, 2020).

⁶ *Struggle Gourmet*, Fuse, <https://www.fuse.tv/shows/struggle-gourmet> (last visited Dec. 8, 2020); Etan Vlessing, *Fuse Media Acquires Transgender Makeover Series ‘Clothes Minded’ (Exclusive)*, Hollywood Reporter (Sept. 21, 2020), <https://www.hollywoodreporter.com/news/fuse-media-acquires-transgender-makeover-series-clothes-minded-exclusive>.

⁷ *About*, Go-Big Show, TBS, <https://www.tbs.com/shows/go-big-show> (last visited Dec. 8, 2020); *That White People Shit*, Fuse, <https://www.fuse.tv/shows/that-white-people-shit> (last visited Dec. 8, 2020).

⁸ *About*, Celebrity Show-Off, TBS, <https://www.tbs.com/shows/celebrity-show-off> (last visited Dec. 8, 2020).

⁹ *Made From Scratch*, Fuse, <https://www.fuse.tv/shows/made-from-scratch> (last visited Dec. 8, 2020); *Struggle Gourmet*, Fuse, <https://www.fuse.tv/shows/struggle-gourmet> (last visited Dec. 8, 2020).

politics, pop culture and dating.¹⁰ TBS, for its part, offers “Full Frontal with Samantha Bee,” which focuses on politics, as well as “Conan.”¹¹

9. Fuse and TBS also feature programming falling within the adult animation genre. Fuse has become increasingly focused on creating and featuring a mix of original adult animation. These shows include “Sugar & Toys,” “Hollywood Puppet Shit Show”, and original quirky 15-minute live action sitcoms (“Ming’s Dynasty,” “WTF Baron Davis”). TBS also features adult animation, including “American Dad,” “Bob’s Burgers,” “Family Guy,” “Final Space,” “Storyville,” and “Tarantula.”

10. Adult Swim, like Fuse and TBS, also features programming in the adult animation genre. Adult Swim’s programming is composed almost entirely of adult cartoons and quirky 15-minute live-action sitcoms, which are featured only in the evening, night, and early morning hours. Fuse and Adult Swim are the only networks featuring live action sitcoms in the 15-minute format, which has become increasingly popular and an increasing point of competition between Fuse and Adult Swim.

11. Fuse and TruTV air programming in the comedy genre. Some of the comedic programming featured on each network is striking in its narrow focus. Both networks, for example, focus their comedic programming on food, with TruTV following Fuse’s lead. For two years, Fuse has aired “Fluffy’s Food Adventures,” which follows stand-up comedian Gabriel

¹⁰ *Like, Share, Dimelo*, Fuse, <https://www.fuse.tv/shows/like-share-dimelo/BroKjPn1VT8> (last visited Dec. 9, 2020).

¹¹ *Full Frontal with Samantha Bee*, TBS, <https://www.tbs.com/shows/full-frontal-with-samantha-bee> (last visited Dec. 9, 2020); *Conan*, TBS, <https://www.tbs.com/shows/conan> (last visited Dec. 9, 2020).

“Fluffy” Iglesias on his culinary trips around the country,¹² in addition to the previously mentioned “Made From Scratch” and “Struggle Gourmet” series. AT&T has followed suit, recently announcing the upcoming cooking competition “Fast Foodies”—advertised as a tongue-in-cheek cooking competition featuring celebrities.¹³ An additional similarity is programming that features NBA basketball players. Fuse’s “WTF Baron Davis” revolves around the unorthodox mentorship of social media phenom BDot (Brandon Armstrong) by Baron Davis, a retired NBA All-Star.¹⁴ TruTV again has sought to emulate Fuse: it has just announced the greenlighting of “Double Cross with Blake Griffin,” a prank show that features NBA All-Star Blake Griffin.¹⁵ So, Fuse and TruTV do not only show share prominently the same genre—comedy shows, but also show narrow niches within that genre—like the food and NBA themes, making them all the more similarly situated.

12. TNT has traditionally focused its entertainment programming on drama. But AT&T has recently placed an increased focus on making less of a distinction between TNT, TBS, and TruTV, and has refocused TNT to extend to genres such as unscripted and reality television.¹⁶ The series “Shaq Life” is one representative example. Like Fuse and TruTV, “Shaq

¹² *Fluffy’s Food Adventures*, Fuse, <https://www.fuse.tv/shows/fluffy-s-food-adventures/EqONBrAg7fKj> (last visited Dec. 9, 2020).

¹³ Press Release, *truTV Serves Up Comedic Cooking Competition Series “Fast Foodies”*, Warner Media (Oct. 28, 2020), <https://pressroom.warnermedia.com/na/media-release/trutv/trutv-serves-comedic-cooking-competition-series-fast-foodies>.

¹⁴ *WTF Baron Davis*, Fuse, <https://www.fuse.tv/shows/wtf-baron-davis/ywl1xz33wHJo> (last visited Dec. 9, 2020).

¹⁵ Press Release, *truTV Scores a Slam Dunk With Series Order for Double Cross with Blake Griffin*, Warner Media (Oct. 1, 2020), <https://pressroom.warnermedia.com/na/media-release/trutv/trutv-scores-slam-dunk-series-order-double-cross-blake-griffin>.

¹⁶ Michael Schneider, *WarnerMedia Blurs the Line Between TNT and TBS as It Preps for Its Streaming Future*, *Variety* (May 15, 2019), <https://variety.com/2019/tv/news/warnermedia-tbs-tnt-snowpiercer-upfronts-1203215822/>.

Life” focuses on an NBA star—Shaquille O’Neil—and like Fuse and TBS, the show falls within the reality genre, following Shaq around as he goes on tour as a DJ, trains for a boxing match, and raises his children.¹⁷ While TNT does not have a large concentration of sitcoms, it programs dramas with strong comedic content, such as “Claws,” “Franklin & Bash,” and “Librarians.”¹⁸

13. While primarily a news network, CNN, like Fuse, places a heavy focus on airing programming in the documentary genre. Fuse’s Fuse Docs series consists of sophisticated social issue-driven documentaries. CNN also places a significant focus on social justice documentaries. Documentaries on Fuse and CNN have shared the same narrow focus. Fuse and CNN have each aired documentaries about empowering females—Fuse’s “She Started It” and CNN’s “Girl Rising” and “We Will Rise”; the failings of the American justice system—Fuse’s “It’s Criminal” and CNN’s “American Jail”; and personal stories of immigration—Fuse’s “Colossus” and “Indivisible,” and CNN’s “Documented.”¹⁹

14. **Awards.** Since 2017, the documentaries aired on Fuse and CNN have repeatedly competed for the same awards and accolades.²⁰ In my opinion, this competition for awards often creates media buzz and broader consumer interest, heightening the significance of shared focus on documentary programming. Indeed, a key selling proposition for any successful network is the number of awards it wins, as awards validate a brand built on smart, quality programming. Fuse’s results have been impressive, and have come quickly. Since Fuse began aggressively pursuing these awards three years ago, Fuse has garnered 25 nominations and wins for various

¹⁷ *About, Shaq Life*, TNT, <https://www.tntdrama.com/shaq-life> (last visited Dec. 9, 2020).

¹⁸ *See Shows*, TNT, <https://www.tntdrama.com/shows> (last visited Dec. 9, 2020).

¹⁹ Lopez Decl. ¶ 36.

²⁰ *See id.* ¶ 43.

prestige and diversity awards.²¹ Fuse’s success in pursuing awards reinforces the quality of its multicultural targeted content and its focus on empowerment, activism, and hope.

15. ***Target audience and programming.*** Fuse competes with the Turner networks to attract diverse, multi-ethnic audiences, through programming that is attractive to such audiences. As a Latino-owned and managed network, Fuse is particularly well-situated to provide authentic representation of all aspects of their lives and culture,²² and has striven to do so through a commitment to creating and acquiring powerful series, documentaries, and independent films that entertain and empower multicultural audiences.²³

16. AT&T affiliate networks themselves have expressed that same focus and commitment. As early as 2010, TBS expressed a commitment to diversity in its programming.²⁴ Warner Media, including TBS and TNT in particular, have focused on increasing diversity in their programming, writers’ rooms, and talent.²⁵ And earlier this year, TBS, TNT, and HBO held

²¹ *Id.*

²² Veronica Villafañe, *Latino-Led Management Team Acquires Controlling Interest In Fuse Media*, Forbes (Nov. 19, 2020), <https://www.forbes.com/sites/veronicavillafane/2020/11/19/latino-led-management-team-acquires-controlling-interest-in-fuse-media/>.

²³ Jillian Morgan, *Fuse Sets Music-Focused Docs as Part of Summer Programming*, Realscreen (June 10, 2020), <https://realscreen.com/2020/06/10/fuse-sets-music-focused-docs-as-part-of-summer-programming/>.

²⁴ Megan Angelo, *At TBS, Diversity Pays Its Own Way*, N.Y. Times (May 28, 2010), <https://www.nytimes.com/2010/05/30/arts/television/30tbs.html> (“In a television world where ‘The Fresh Prince of Bel-Air’ and ‘The Cosby Show’ are distant memories, TBS has quickly become the home of minority-driven comedy.”).

²⁵ Mikey O’Connell, *The Black List Moves into TV with TNT and TBS Diversity Program*, Hollywood Reporter (Feb. 3, 2014), <https://www.hollywoodreporter.com/news/black-list-moves-tv-tnt-676709>.

a pop-up experience at Sundance to “celebrate their commitment to multicultural storytelling, creators and audiences.”²⁶

17. *Turner ads on Fuse.* Evidence of one programmer trying to “steal” the viewers of another programmer may be the strongest evidence that two programmers are similarly situated. This is precisely what the Turner networks have been doing by purchasing ads on Fuse. Specifically, [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [[END CONFIDENTIAL]]

18. *Competition for the same content.* Also important is the competition between Fuse and the AT&T affiliate networks for the same content. In one telling example, Fuse aired five seasons of television programming in partnership with Complex, a lifestyle publication and brand, between 2017 and 2019, including Complex’s highly successful “Hot Ones” series. Subsequently, AT&T’s TruTV obtained the intellectual property rights to Complex’s “Hot Ones” and expanded that programming into a full series and different format (a 5-8 minute segment

²⁶ Dino-Ray Ramos, *HBO, TNT and TBS Team for Sundance ‘Our Stories to Tell’ Multicultural Pop-Up Experience*, Deadline (Jan. 17, 2020), <https://deadline.com/2020/01/hbo-tnt-tbs-sundance-film-festival-our-stories-to-tell-diversity-inclusion-representation-1202834003/>.

²⁷ Lopez Decl. ¶ 40.

²⁸ *Id.*

within the “Complex x Fuse” program on Fuse versus 30-minute format on TruTV).²⁹

Furthermore, the shows aired by Fuse often rely on the same screenwriters as those aired by the AT&T affiliated networks. For example, Fuse’s current animated series, “Sugar & Toys,” now in its second season, is created, produced, and written by Brian Ash and Carl Jones, who between them have written and produced seven different programs appearing on AT&T affiliated networks: “The Boondocks” (Adult Swim); “Black Dynamite” (Adult Swim); “Freaknik: The Musical” (Adult Swim); “The Last O.G.” (TBS); “Young Love” (HBO Max); “The Jellies” (Adult Swim); and “Lazor Wulf” (Adult Swim).³⁰ This overlap of talent and the creative sensibilities underlying “Sugar & Toys” and so many Adult Swim shows suggests there is good reason [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] All of these shows have similar voices and speak to similar audiences.

19. **Target audience metrics.** The data also show that Fuse targets the same demographics as AT&T affiliate networks. The viewers of both Fuse and TBS skew female [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]]³¹ They also skew young. The median age for Fuse is [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [[END CONFIDENTIAL]] Fuse hones its

²⁹ *Id.* ¶ 41.

³⁰ *Id.* ¶ 39.

³¹ *Id.* ¶ 44.

³² *Id.*

³³ *Id.*

content for younger viewers. It states that it provides “cultural-based content and experiences for a multicultural millennial and GenZ audience.”³⁴ Similarly, the Warner Media For Brands website emphasizes Adult Swim is “#1 with millennials 14 years in a row.”³⁵

20. Just as important,³⁶ most viewers of Fuse also watch TBS, TNT, and Adult Swim.

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

21. [[BEGIN CONFIDENTIAL]]

³⁴ *Fuse.TV*, Fuse Media, <https://www.fuse.tv/about> (last visited Dec. 9, 2020).

³⁵ *Entertainment and Emerging Consumers*, WarnerMedia For Brands, <https://www.warnermediaforbrands.com/divisions/entertainment> (last visited Dec. 9, 2020).

³⁶ See *Game Show Network, LLC v. Cablevision Systems Corp.*, *Initial Decision of Chief Administrative Law Judge Richard L. Sippel*, 31 FCC Rcd. 13841, 13881 ¶ 68 (2016) (“This fact in particular— i.e., that WE tv viewers switched to GSN significantly more often than they switched to Wedding Central—demonstrates the substantial commonality among the three networks' target audience because WE tv and Wedding Central had virtually identical programming that indisputably targeted the same audience.”), *reversed by Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant, Memorandum Opinion and Order*, 32 FCC Rcd. 6160 (2017).

³⁷ Lopez Decl. ¶ 45.

³⁸ *Id.* ¶ 46.

³⁹ *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[[END CONFIDENTIAL]]

22. Viewer demographics for Fuse and AT&T affiliated programming also show striking similarities. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* ¶ 47.

⁴³ *Id.*

⁴⁴ *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

23. ***Public and marketplace perception.*** The treatment of Fuse and AT&T-affiliated networks in the press also demonstrates that the two target the same demographic. A plethora of news stories lump Fuse and the AT&T networks together and describe them as appealing to the same viewers. In February 2019, Deadline wrote about a Television Critics Association panel focused on adult cartoons, which featured executives from Fuse Media, Adult Swim, and TBS.⁴⁷ And just last month, CableFax wrote about the focus of both Fuse and AT&T affiliated networks on election-related programming.⁴⁸ The article highlighted Fuse Media’s history of election coverage, and its effort to provide its diverse audience with election-related information. The article also discussed HBO Max’s related initiative—the offering of a free viewing of election-related programming that emphasized the power of a vote.

24. ***Ratings.*** Cost-adjusted ratings show that Fuse is comparable to the Turner networks. While naturally much smaller than the Turner networks, with respect to ratings, Fuse has managed to punch above its weight.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Lisa de Moraes, *Animation Execs Ponder ‘The Simpsons,’ Suspension Of Disbelief, Tackling “Toxic” Fans – TCA*, Deadline (Feb. 9, 2019), <https://deadline.com/2019/02/animation-the-simpsons-rick-morty-toxic-fans-tca-1202553476/>.

⁴⁸ Cablefax Staff, *Get Out the Vote*, Cablefax (Nov. 2, 2020), <https://www.cablefax.com/programming/get-out-the-vote-2>.

25. Even before any adjustment for the cost of each network is made, and even setting aside Nielsen's well-known undercounting of independent programmers' audiences, Fuse's ratings are in the same ballpark as those of a number of Turner networks. Nielsen data for December 2018, the last month Fuse Media was carried by Comcast, show the popularity of Fuse's programming as compared to that of AT&T's affiliated networks. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [[END CONFIDENTIAL]]

26. Fuse's Nielsen ratings for November 2020 are down from December 2018 as a result of loss of distribution. This decrease is in large part a result of the loss of carriage on Comcast in December 2018.⁵² These lower ratings are also consistent with the generally lower ratings of AT&T's affiliated networks during that same period, with the exception of CNN, which primarily aired election coverage during an election.⁵³

27. Even more important, the ratings of Fuse are comparable to those of the AT&T networks when adjusted on the basis of each network's reach and fees. Fuse has calculated each

⁴⁹ Lopez Decl. ¶ 49.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* ¶ 50.

⁵³ *Id.*

network's cost per rating point, based on Kagan data on fees and Nielsen data on ratings.

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] These comparisons show that Fuse can, and does, punch above its weight, and that it overcomes the enormous seignorial privileges that the Turner networks enjoy because they are so well established and because they are affiliated with one of the nation's largest distributors. The Turner networks are among the longest running networks on cable. TBS started as early as 1976. As a consequence, they have had the benefit of a much longer runway than Fuse, and the opportunity to develop greater familiarity with the brand.⁵⁹ It would of course be inappropriate to interpret the similarly situated test so narrowly as to require the same vintage and length of runway for an independent programmer as for a programmer of the type of AT&T's affiliated networks. In my opinion, Fuse's calculations and these conclusions are reasonable.

⁵⁴ *Id.* ¶ 52.

⁵⁵ *Id.*

⁵⁶ *Id.*

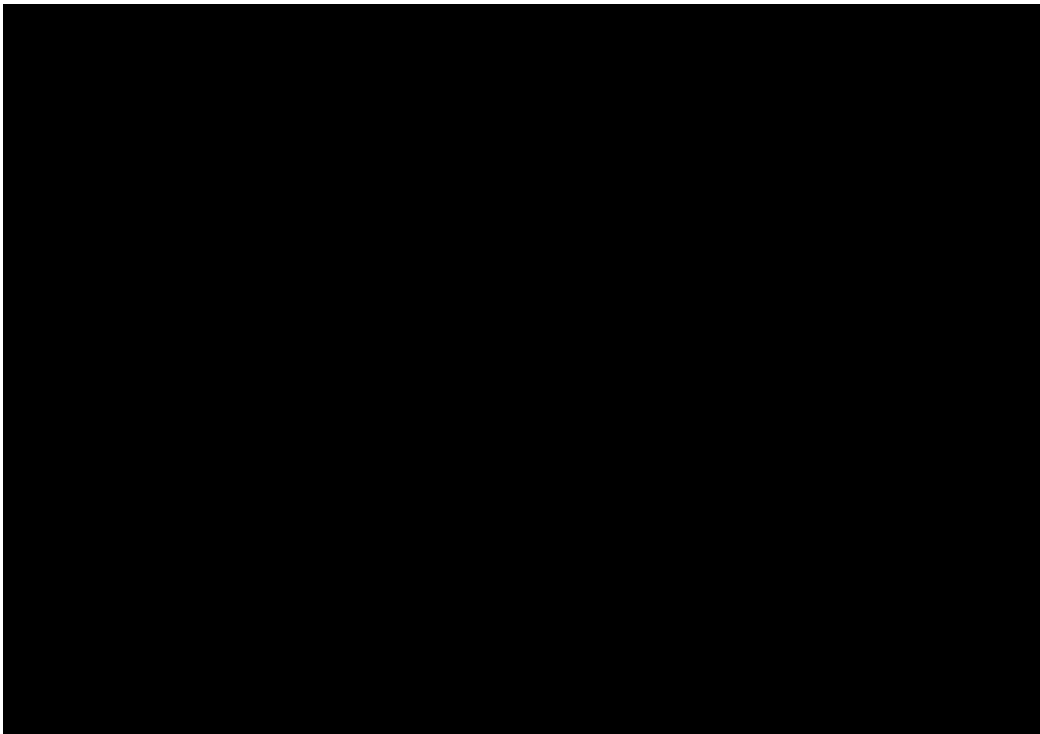
⁵⁷ *Id.*

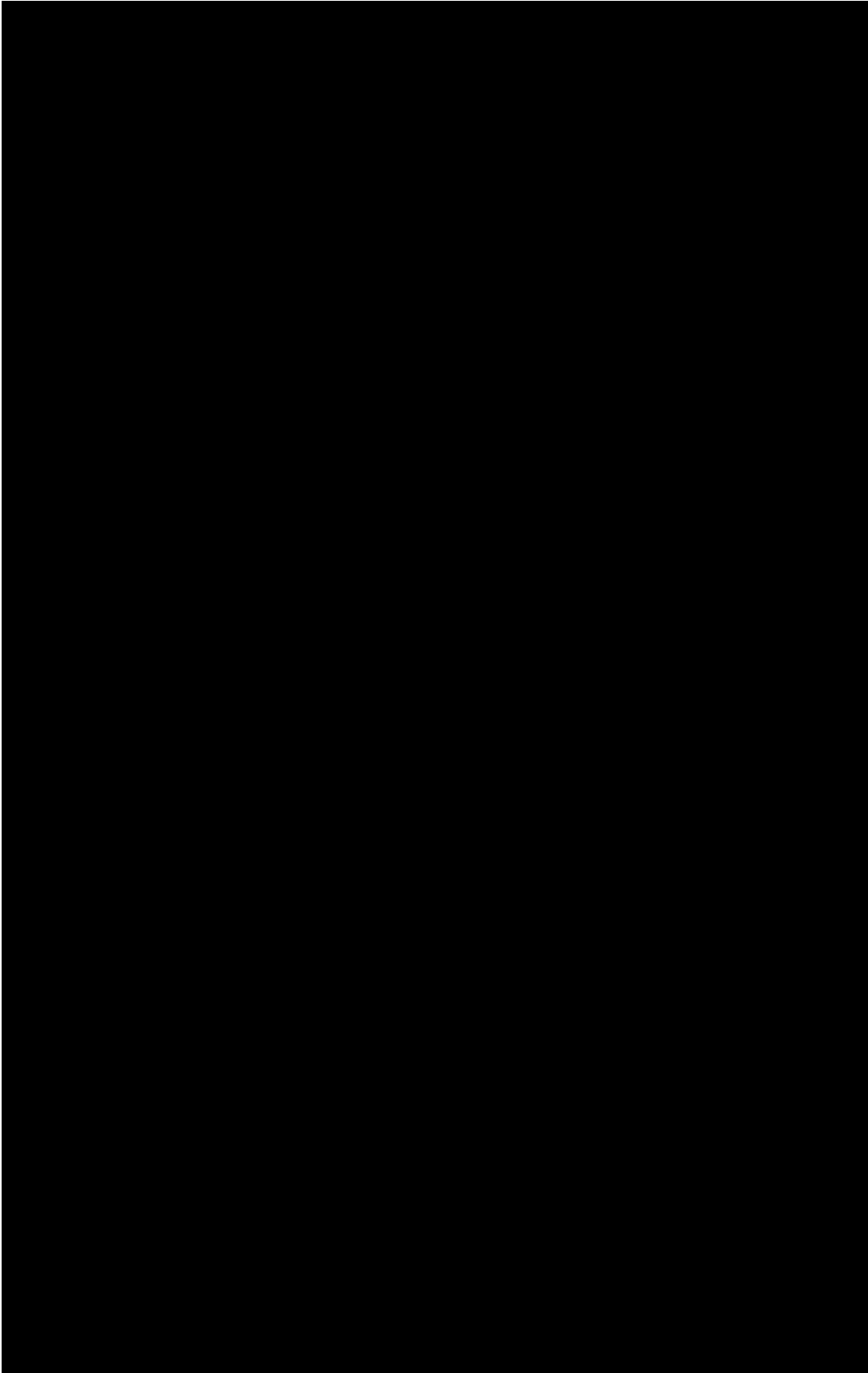
⁵⁸ *Id.*

⁵⁹ *Id.*

28. *Advertisers.* Fuse also competes directly with AT&T's programming affiliates for advertising dollars. Advertising time on many Fuse shows is a substitute for time on comparable AT&T-affiliated network shows in the eyes of many advertisers. I understand that Fuse shares many large advertisers with AT&T affiliate networks. The Commission should not discount the shared advertisers because they are large or because they advertise on other networks, too, as the fact that they advertise on an independent network like Fuse demonstrates the value the millennial and Gen Z audience delivers.

29. Fuse competes directly with AT&T's programming affiliates for advertising dollars. Advertising time on many Fuse shows is a substitute for time on comparable AT&T-affiliated network shows in the eyes of many advertisers. It is therefore no surprise that, as Ms. Lopez testifies, Fuse shares several key advertisers with TBS, TNT, Adult Swim, and TruTV. In fact, all of the largest Fuse advertisers in the following list also purchase advertising on TBS, Adult Swim, and/or TruTV. [[BEGIN CONFIDENTIAL]]





[[END CONFIDENTIAL]]⁶⁰

30. ***Other metrics.*** The programming of Fuse and that provided by AT&T-affiliated networks are in fact comparable under a number of different metrics. The programming of Fuse is comparable to that offered by AT&T affiliates in terms of [[BEGIN CONFIDENTIAL]]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]⁶¹

II. AT&T’S DISCRIMINATORY BEHAVIOR HAS UNREASONABLY RESTRAINED FUSE MEDIA’S ABILITY TO COMPETE FAIRLY

31. AT&T’s treatment will unreasonably restrain Fuse’s ability to compete in multiple ways. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]] With audience consumption of video programming at an all-time high, the most-desirable talent, producers, writers, and directors will choose to contract with networks with broader national exposure. The loss of distribution on AT&T would create a significant detriment to Fuse Media’s ability to attract and retain talent of this kind. In the case of the social justice documentaries featured by Fuse Media in particular, which are accepted by very few networks, the filmmakers may choose to feature their programming on CNN, to Fuse Media’s even further detriment.⁶²

⁶⁰ *Id.* ¶ 55.

⁶¹ *Id.* ¶ 54.

⁶² *Id.* ¶ 61.

32. Fuse Media will also be significantly hampered in its ability to attract advertisers.

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]⁶³

33. Indeed, the loss of revenue from both affiliate and ad sales streams due to reduced distribution would seriously affect Fuse Media's ability to fund off-channel marketing and advertising to drive awareness and content sampling, creating a spiral effect. [[BEGIN

CONFIDENTIAL]]

[[END CONFIDENTIAL]] In short, discontinuance of carriage on AT&T will threaten Fuse Media's very existence as a network, and will do so in the short term.⁶⁴

⁶³ *Id.* ¶ 62.

⁶⁴ *Id.* ¶ 63.

* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on December 11, 2020

A handwritten signature in blue ink, appearing to read "Steven Sklar", is written over a horizontal line.

Steven Sklar
Managing Member
S Squared Advisory, LLC

EXHIBIT 20

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
FUSE, LLC,)	File No. CSR-____-P
and)	
FM NETWORKS, LLC,)	
Complainants,)	
)	
v.)	
)	
AT&T INC.,)	
DIRECTV, LLC)	
and)	
AT&T SERVICES, INC.,)	
Defendants.)	

DECLARATION OF COLEMAN BAZELON AND WILLIAM P. ZARAKAS

I. Introduction

A. QUALIFICATIONS

1. Coleman Bazelon is a Principal in the Washington, D.C. office of The Brattle Group. He is an expert in regulation, strategy and valuation in the wireless, wireline, and video sectors. His practice encompasses the modern information infrastructure and the content that fills it. He has consulted and testified on behalf of clients in numerous telecommunications matters, including wireless license auctions and spectrum management; internet matters, including the broadband and applications markets; media matters, including in the programming and copyright markets; entertainment, including analyses of gaming markets; and sports, advising on economic matters related to baseball, Australian Rules Football, and the Olympics. In addition to regulatory, policy and valuation analyses Dr. Bazelon's engagements have also focused on a range of issues within the competition and intellectual property areas. Dr. Bazelon frequently advises regulatory and legislative bodies, including the U.S. Federal Communications Commission and the U.S. Congress.¹
2. William P. Zarakas is a Principal with The Brattle Group and an expert in economic, competition and regulatory matters in the telecommunications, media and energy industries. He has provided expert reports and testimonies before the FCC on a range of issues including carriage disputes, bargaining models, access pricing, competition in telecommunications markets, and the feasibility of deploying broadband networks. He has also conducted analyses and provided testimony on several recent horizontal and vertical mergers involving the telecommunications and media industries, including the proposed mergers of Sprint and T-Mobile, Comcast and Time Warner Cable and Tribune Media Company and Sinclair Broadcast Group. Mr. Zarakas has also conducted analyses and provided testimonies on the value of wireless spectrum, and on the distribution of royalties and retransmission fees in the cable and satellite television industries before the Copyright Royalty Judges (Library of Congress), and has provided testimony and expert reports before the Federal Energy Regulatory Commission,

¹ The C.V. for Dr. Bazelon can be accessed at: <https://www.brattle.com/experts/coleman-d-bazelon>.

the Securities and Exchange Commission, the U.S. Congress, state regulatory agencies, and arbitration panels. He holds an M.A. in economics from New York University and a B.A., also in economics, from the State University of New York²

B. BACKGROUND

3. Fuse Media comprises Fuse and FM (Fuse Music) linear and video-on-demand channels, Fuse Digital including its websites (Fuse.tv), OTT apps and channels, and live events. It creates multicultural content and is available through cable (such as Charter and Altice) and satellite (such as DISH), virtual MVPDs (such as Sling TV, Fubo TV), and the app is available on Roku, Amazon Fire TV and Apple TV.³ Fuse is also currently carried on AT&T's DIRECTV and U-verse platforms. AT&T has proposed significantly altering the carriage agreement, and therefore the economic relationship, with Fuse. Absent reaching a new agreement with Fuse, AT&T would terminate carriage of Fuse on its platforms.
4. Counsel for Fuse has advised us that Section 616 of the Communications Act of 1934 prohibits MVPDs from anti-competitive practices with respect to carriage agreement with program providers (i.e., cable / satellite TV channels). Specifically, the Act prohibits MVPDs from discriminating against carriage of programmers in order to advance their own affiliated programming. Counsel has advised us that complaints to a carriage dispute must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD.

C. ASSIGNMENT

5. We have been asked by the Counsel for Fuse to assess the degree to which Fuse programming is similarly situated with programming that is affiliated with AT&T, specifically Turner channels TOON, TBS, TNT, TRUTV and Adult Swim (ADSM). In addition, Counsel requested that we provide perspective as to the economic basis underlying decisions by an MVPD to discontinue carriage of programming that it previously and consistently elected to include in its program line up – as appears to be the case with AT&T's DIRECTV and U-verse platforms.

² The C.V. for Mr. Zarakas can be accessed at <https://www.brattle.com/experts/william-p-zarakas>.

³ Fuse, "About," accessed December 9, 2020, <https://www.fuse.tv/about>. See also <https://deadline.com/2020/11/fuse-media-in-post-bankruptcy-reset-is-bought-by-latino-led-management-group-1234618680/>.

Finally, Counsel also requested that we comment public interest implications of Fuse not being carried on AT&T's platforms.

D. SUMMARY OF CONCLUSIONS

6. Our analysis indicates that Fuse programming is similarly situated to programming on Turner networks, notably ADSM, TRUTV, TOON, TNT and TBS, which are affiliated with AT&T. Similarities in programing can be found across genres, demographics and advertising, with several Turner networks directly targeting Fuse's viewers by purchasing advertising on Fuse. The availability of this affiliated similarly situated programming provides AT&T with economic motivation to discriminate against Fuse. Specifically, AT&T is able to avoid paying carriage fees (except through transfer pricing accounting) for programming and also realize additional benefits through increased advertising by using its own (affiliated) programming, rather than contracting with an outside party (Fuse) and trying to channel Fuse's audience to its affiliated networks. The presence of such economically beneficial programming armed AT&T with a superior bargaining position, thereby enabling it to avoid negative economic impacts and secure benefits from terminating carriage of Fuse. AT&T did not enjoy such a position prior to AT&T's acquisition of the Turner channels.
7. Counsel has advised us that AT&T has been unresponsive to Fuse's offer to renew carriage and that, when it did respond, it [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] From an economic perspective, AT&T would take this position only if it found that it is financially better off excluding Fuse from its platform line up and trying to divert Fuse's audience to its own affiliated networks.

II. Fuse is "Similarly Situated" to AT&T's Turner Channels

8. Determining whether alternative programming is similarly situated (with other programming) is "based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."⁴ From an economic perspective, the inquiry is trying to determine the economic substitutability of different programming. This

⁴ FCC, "In the Matter of Revision of the Commission's Program Carriage Rules Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage," Second R&O in MB Docket No. 07-42 and NPRM in MB Docket No. 11-131, ¶14, adopted July 29, 2011, <https://docs.fcc.gov/public/attachments/FCC-11-119A1.doc>.

substitutability is indicated by the degree of overlap of the factors noted. As we discuss below, several Turner channels – notably, ADSM, TOON, TBS, TNT, TRUTV – have significant overlaps with Fuse programming in terms of genre, viewership demographics and target advertising. That is, these Turner programs are similarly situated with Fuse.

9. As we discuss in a subsequent section, another test for similarly situated programming involves whether the acquisition of programming changes the bargaining positions of otherwise (relatively) equally positioned parties. Carriage fees are not expected to change when the surplus value created jointly by a programmer (Fuse) and an MVPD (AT&T) is otherwise unchanged. However, the introduction of similarly situated programming affiliated with the MVPD mitigates some or all of the value that would otherwise be lost to the MVPD if the MVPD no longer had access to non-affiliated programming. Put in other words, the question is whether AT&T's affiliated networks are sufficiently similar to Fuse so that AT&T can avoid paying Fuse carriage fees while, at the same time, mitigating any financial losses (resulting from no longer carrying Fuse programs) by diverting its audiences to affiliated programmers and increasing the advertising revenues paid to its affiliated networks. In simple parlance, a test to determine whether Fuse programs and AT&T's affiliated networks are similarly situated involves whether AT&T can “have its cake and eat it too.”

A. GENRE

10. Comparison of Fuse's program genres with those of Turner networks TOON, TBS, TNT, TRUTV and ADSM indicates that Fuse and the Turner channels are similarly situated. Table 1 (attached) lists the overlap of genres between Fuse and the Turner networks. Examples of genre based similarities include:⁵

- *Sugar and Toys* (Comedy/Cartoon) is a cartoon programming for teens and adults, accompanied by live segments, and is the same genre as Turner's *Adult Swim* (ADSM), TBS's *American Dad* and *Family Guy*, which airs on both TBS and TOON.⁶

⁵ The genre categories shown in Table 1 are not exhaustive. In addition, we understand that shows may fall under multiple genres; the above representations reasonably reflect programming genre based on program descriptions and reviews.

⁶ Fuse, “Sugar and Toys,” <https://www.fuse.tv/shows/sugar-and-toys/Z8OINZkM0Cnz>; “American Dad,” TBS, <https://www.tbs.com/shows/american-dad>; TOON,

- *Made from Scratch 2* and *Struggle Gourmet* (Docu-Series/Food) are food shows with celebrity guests that are also a part talk show and reality TV. They are in the same genre as *Impractical Jokers: Dinner party* on TRUTV.⁷
- *WTF Baron Davis* is a show featuring the two-time NBA all-Star Baron Davis and is in the same genre as *Shaq Life* on TNT, which also features the famous NBA player Shaquille O’Neil.⁸

11. Also, it is worth noting that the programming Fuse provides serves a specific subset of the overall programming market focused on multicultural programming.⁹ For a variety of reasons – not least the historical legacy of minority communities lack of access to capital and social discrimination against minority-focused programming – this type of programming has been and continues to be underprovided by MVPDs. From an economist’s perspective, the market has failed to provide the socially optimal amount of this programming. Consequently, policy support to correct this market failure is in the public interest and, just as much, allowing this programming to be diminished has specific public interest harms.

B. DEMOGRAPHICS

12. In terms of overall cable viewership (Table 2, covering 2019-2020, attached), incomes of viewers are similar. The audience for Fuse viewers has a (average) median income of [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] while ADSM and TOON viewers have similar median incomes of [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] respectively. Table 2 also shows that Fuse and a majority of the Turner

https://americandad.fandom.com/wiki/Cartoon_Network; “Family Guy,” TBS, <https://www.tbs.com/shows/family-guy>; TOON, https://familyguy.fandom.com/wiki/Cartoon_Network; All accessed December 10, 2020.

⁷ Fuse, “Made from Scratch,” <https://www.fuse.tv/shows/made-from-scratch/RIY4DPmPrU0N>; “Struggle Gourmet,” <https://www.fuse.tv/shows/struggle-gourmet/x6qZwnDL5FJG>; TRUTV, “Impractical Jokers: Dinner Party,” <https://www.trutv.com/shows/impractical-jokers-dinner-party>, All accessed December 10, 2020.

⁸ Fuse, “WTF Baron Davis,” <https://www.fuse.tv/shows/wtf-baron-davis/ywl1xz33wHJo>; TNT, “Shaq Life,” <https://www.tntdrama.com/shaq-life>, All accessed December 10, 2020.

⁹ R. Thomas Umstead, “Fuse Reaches Out to Young, Multicultural Viewers,” September 14, 2020, <https://www.nexttv.com/news/fuse-reaches-out-to-young-multicultural-viewers>.

Continued on next page

channels (TBS, TNT, TRUTV and ADSM) each have Hispanic viewership comprises between [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of total channel viewership.¹⁰

13. In terms of overall viewership by age, Fuse and the Turner networks have overlapping age demographics. We compared the percentage of viewership by age category (Figure 1, attached) for Fuse and the five Turner networks and found:

- For the 18-24 age category: [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the program audience for both Fuse and ADSM fall into this age category.
- For the 25-34 age category: [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the channel audience for each of Fuse, ADSM and TRUTV fall in this age category.
- For Fuse and ADSM, [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the channel audience for both channels fall between 18-34 year olds.
- For the 45-54 age category: [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the channel audience for both Fuse and TRUTV falls in this age category.

14. Audience demographic comparisons (age, gender, race and education) can also be applied to specific programs (as shown in Table 3, attached):¹¹

- Age profiles: *Genius X Fuse*, *Complex X Fuse*, *Fuse Town Hall* and *Unframed* have the same age profile as TRUTV audiences, with the median age being [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]]
- Income profiles:
 - *Genius X Fuse* and *Struggle Gourmet* have similar income profiles to ADSM viewers, each having a median income of [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] approximately.

¹⁰ All data are based on Nielsen unless otherwise specified.

¹¹ These data are for an 11 month snapshot in time and are therefore subject to some variation, more so than data sets that cover a longer period of time.

- *Like, Share, Dimelo* is in the same income range as TBS and TRUTV, with the median income of viewers around [[BEGIN CONFIDENTIAL]] [REDACTED] [REDACTED] [[END CONFIDENTIAL]]
 - Gender profiles: *Sugar and Toys*, *Genius X Fuse*, *Complex X Fuse*, *Like, Share, Dimelo*, *Hype Up*, *Modern Day Gladiators*, *That White People Shit 2* and TOON and TBS all have a [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] female viewership.
 - Race profile: About [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the viewership of Fuse’s *That White People Shit 2*, *Town Hall Fuse* and TNT viewers are Black.
 - Education level: [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the viewers of Fuse’s *Kickasso*, *Ming’s Dynasty*, *Unframed*, and Turner’s AD5M and TOON have some college education.
15. To observe viewership overlap, we use the primary duplication (overlap) statistics from Nielsen, which we summarized in Table 4, attached. This metric shows the percent of Fuse viewers who also view another channel or program.¹² Review of Nielsen’s October 2020 overlap statistics indicates that:
- [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the Fuse viewers also view TBS;
 - [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of the Fuse viewers also view TNT; and,
 - About [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] of Fuse viewers also view AD5M, TRUTV and CNN.

C. ADVERTISING

16. Advertisers tend to target specific demographic groups reflective of their target customers. Thus, advertising overlap (i.e., whether and how much specific advertisers deploy ads on multiple programs) also provides an indicator of whether programs are similarly situated. Review of advertising data indicates that:

¹² Nielsen, “NP Power,” Guide, p. 2, accessed December 9, 2020, <http://en-us.nielsen.com/sitelets/cls/documents/npower/Venn-Diagrams-April2011.pdf>

- Turner’s ADSM, TRUTV and TBS, as well as Turner’s CNN, all [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] which provides a particularly strong indication that their target viewers are similar to those of Fuse.
- There is a large overlap between advertisers who advertise on Fuse and on the subject Turner channels. Specifically, [[BEGIN CONFIDENTIAL]] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [[END CONFIDENTIAL]]

D. CONCLUSION: SIMILARLY SITUATED

17. Based on the discussion presented above, we conclude that a majority of the Turner networks have programs that are similarly situated to those of Fuse in terms of genre, demographics and advertiser targeting. These similarities in genre, demographics and advertising indicate that Fuse and the Turner networks are competing for the same viewers. This can be directly for the same viewers (“eyeballs”), as the advertising for Turner networks directly on Fuse indicates, or for the same type of audience (although not identical viewers) as the other analysis indicates.

III. Changing Circumstances Explain the Change in AT&T’s Carriage Position

A. WITHOUT ITS OWN PROGRAMMING, AT&T WOULD BE WORSE OFF WITHOUT CARRIAGE OF FUSE

18. Removing programming from an MVPD line up reduces the carrier’s cost of production (i.e., it no longer has to pay carriage fees). However, it can also be revenue reducing as some portion of subscribers assign value to the subject programming, and thus is accompanied by its own cost. This can be measured by the incremental revenue lost from subscribers who discontinue AT&T’s service as well as the costs of stemming subscriber defection (i.e., customer retention costs, such as direct win back costs for customers who threaten to leave, and the added cost to the customer care network from having to field complaints or related inquiries from customers). The net of these economic effect is the direct economic effect on AT&T’s profits from no longer carrying Fuse. The magnitude of each of these benefits and costs cannot be

assessed without discovery and full access to extensive information that is in AT&T's exclusive custody. However, we can offer inferences based on AT&T's change of position toward Fuse.

19. AT&T's ongoing carriage of Fuse suggests that AT&T realized positive economic value from its carriage. Dropping Fuse would suggest that AT&T is either irrationally disposing of economic value, or that it has found a more valuable programming proposition. A simple analysis of AT&T's carriage economics follows.
20. The direct effect of substituting AT&T program for Fuse programming is an immediate reduction of costs, as payment from DIRECTV and U-verse to the Turner channels is merely a transfer payment among affiliates. In addition, however, AT&T may also realize indirect and significant indirect benefits when it substitutes affiliated programming in place of programming from Fuse. These indirect benefits come through the advertising channel because the number of AT&T subscribers (and therefore the number of households exposed to the AT&T owned programming) cannot reasonably increase when Fuse is dropped.
21. As explained further below, this change in economics and options results in a material change in AT&T's bargaining position when negotiating with Fuse for carriage fees and terms. In other words, the decisive change that has caused AT&T to change its treatment of Fuse appears to be AT&T's becoming vertically integrated.

B. CHANGE IN BARGAINING POSITION

22. Counsel has indicated that AT&T and its predecessors freely entered into and renewed their economic relationship with Fuse and FM since 2006. However, AT&T changed its position dramatically this year, when it proposed [[BEGIN CONFIDENTIAL]] [REDACTED]
[REDACTED]
[REDACTED] [[END CONFIDENTIAL]] in place of its current AT&T-Fuse value sharing arrangement.
23. The economic benefit to AT&T of carrying Fuse likely changes over time as program markets and channel audiences evolve. However, it is highly unlikely that Fuse's value proposition has changed so dramatically that [[BEGIN CONFIDENTIAL]] [REDACTED]
[REDACTED] [[END CONFIDENTIAL]] As indicated above, a more likely explanation is found in AT&T's acquisition of similarly situated programming through its acquisition of Time Warner and several Turner networks.

24. Program carriage negotiations fall within the classic bilateral bargaining framework developed by Nash and others.¹³ This framework teaches that the parties bargain over the value created by reaching agreement (in this case carriage of Fuse's programming on AT&T's networks), with the value created measured as the increase in value over what would happen when the parties do not come to agreement. This value is referred to as the *surplus* created. It is then the 'pie' the parties negotiate over, with program carriage fees being the mechanism through which AT&T and Fuse share the surplus value. In other words, the value 'pie' is divided into the proportions agreed to by the negotiating parties (i.e., AT&T and Fuse).
25. Bargaining theory also teaches that the proportion of surplus that the parties will agree to accept is reflective of their bargaining power. Absent other information, if the parties are assumed to have equal bargaining power, then they would be expected to split the total surplus evenly (i.e., 50% of the value to each side). Each party's bargaining power, however, is (inversely) related to how much they have to lose if the parties do not come to agreement. That is, whoever has less to lose when threatening to disagree – the so called *threat point* when negotiating – tends to bargain for a larger slice of the pie. For example, if Party A finds itself better off when agreeing to a given value split, but Party B is only modestly advantaged by such a split, then Party B – who credibly has less to lose if they walk away – has more bargaining power (than Party A). Party B is thus able to negotiate for a larger share of the surplus that is jointly created through coming to agreement.
26. This is the case for AT&T when it acquired Turner network programming that is similarly situated to Fuse's programming. That is, AT&T improved its bargaining position with Fuse compared to where it was prior to its acquisition of the Turner channels. Even when the value to AT&T created by carrying Fuse is unchanged, the fact that some of that lost value would be made up by programming now owned by AT&T means that AT&T's bargaining strength has increased relative to Fuse's bargaining position. This change, in turn, provides further corroboration that Fuse and the programming now owned by AT&T are similarly situated—otherwise, AT&T's behavior would not have changed so materially. The change is also

¹³ John Nash, "The Bargaining Problem," *Econometrica*, Vol. 18(2), April 1950. pp. 155-162; See also, Ken Binmore, Martin J. Osborne and Ariel Rubinstein, "Noncooperative Models of Bargaining," Chapter 7, *Handbook of Game Theory with Economic Applications*, Vol. 1, 1992, pp. 179-225.

consistent with AT&T's changed position that instead of sharing the value created by Fuse with Fuse it can now keep a much larger share of that value created for itself.

27. Program carriage rules are intended to undo an advantage created by combining programming ownership with video distribution platform ownership. One interpretation of the program carriage rules would be that they enforce a world where the vertically integrated entity should act as if its threat point when negotiating with unaffiliated programming networks did not include the benefit of owning programming. This would be consistent with the MVPD not taking advantage of its vertical ownership of programming. Since the most salient and significant change to AT&T and Fuse that could lead to AT&T dramatically changing its bargaining posture with Fuse is the acquisition of similarly situated affiliated programming, this seems like just the situation the programming carriage rules were intended to address.

IV. Fuse Will be Harmed by AT&T's Carriage Termination

28. Advertising rates commanded by programmers are directly related to the reach of their network. Network effects are also at play in determining the popularity and, accordingly, the value of the subject program network. That is, programming has network effects, analogous to the classic example of telephones or any online platforms or games – especially in today's interconnected world. Consumers gain value from having friends use the same platform or experience the same good, and the platform or good becomes more valuable as more consumers use it.¹⁴ This implies that for a network good, all else equal, the willingness of a consumer to pay increases with the number of units sold or expected to be sold.¹⁵ The same is the case for programming: as more people watch a particular program, it creates a buzz, and induces others to watch the same program, increasing viewership and advertising revenues, as well as presenting merchandising opportunities.¹⁶

¹⁴ Oz Shy, "A Short Survey of Network Economics," *Review of Industrial Organization*, Vol. 38, March 2011, pp. 119–149, <https://link.springer.com/article/10.1007/s11151-011-9288-6#citeas>.

¹⁵ Nicholas Economides, "Public Policy in Network Industries," 2006, http://neconomides.stern.nyu.edu/networks/Economides_Public_Policy_In_Network_Industries.pdf.

¹⁶ Eric Jorgensen, "The Power of Network Effects: Why They Make Such Valuable Companies, and How to Harness Them," June 22, 2015, accessed December 10, 2020, <https://medium.com/evergreen->

29. AT&T controls about 27% of the subscription video market, with DIRECTV by itself accounting for 21% of the U.S. national market.¹⁷ The DIRECTV platform thus provides Fuse with access to a large base of customers, importantly spread out across the entire country (rather than concentrated in distinct geographic markets). Due to DIRECTV's national footprint, losing access to this national base of customers will have a disproportionately large impact on Fuse. Most immediately, the loss of audience reach will most likely drive down the rates that Fuse can charge for advertising. In addition, however, Fuse will be adversely impacted by the mitigation of its network effects. For example, as less people watch Fuse programs, the *buzz* among viewers and would-be viewers declines, leading to a more pronounced snowball effect that further reduces the number of viewers watching Fuse.
30. In contrast, AT&T's affiliated programmers (i.e., the Turner networks) stand to gain from the loss in Fuse's audience reach, notably through an increase in revenue from advertising. First, the number of impressions that AT&T owned programming receives will increase as viewers opt to switch their viewing from Fuse to AT&T owned content because Fuse programs are no longer available to them. Second, AT&T programs will fill the void for targeted advertising to specific demographic groups; i.e., advertising that was previously delivered over Fuse. Taking Fuse out of the running means that AT&T's affiliated networks will be able to sell more advertising inventory or sell existing inventory at a higher rate.

business-weekly/the-power-of-network-effects-why-they-make-such-valuable-companies-and-how-to-harness-them-5d3fbc3659f8.

¹⁷ Calculation: AT&T total market share equals (24,494 thousand/91 million) = 26.9%, AT&T Satellite/DIRECTV market share = (19,222 thousand/91 million) = 21.1%. AT&T total video connections and satellite video connections in 2018 from AT&T 2018 Annual Report, p. 25. Total US TV subscribers in 2018 from Wonder, "US Cable TV Subscribers," September 10, 2019, <https://askwonder.com/research/us-cable-tv-subscribers-taddgg6ze#:~:text=TREND%20STATISTICS&text=The%20number%20of%20United%20States,million%20subscribers%20cut%20the%20cord>.

APPENDIX

Table 1

Comparison of Program Genres
Fuse vs. Turner Networks

Genres	Fuse	ADSM	TOON	TBS	TNT	TRUTV
Talk Shows	X			X		X
Comedy/ Sitcoms	X	X	X	X		X
Docu-Series	X	X		X	X	
Animation	X	X	X	X	X	
Reality TV	X				X	X
Food	X			X		
Music	X					

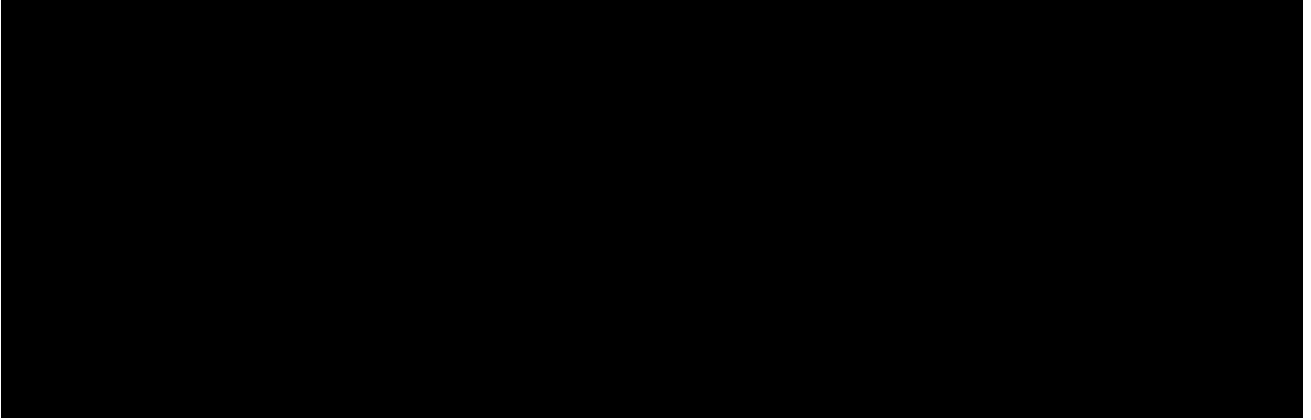
Source: Based on program and genre descriptions provided on network websites.

Note: The genre categories shown in the table are not exhaustive. In addition, we understand that shows may fall under multiple genres; the above representations reasonably reflect programming genre based on program descriptions and reviews.

Table 2

**Viewer Profile Comparison
Fuse vs. Turner Networks
Q1 2019 – Q3 2020**

[[BEGIN CONFIDENTIAL]]



[[END CONFIDENTIAL]]

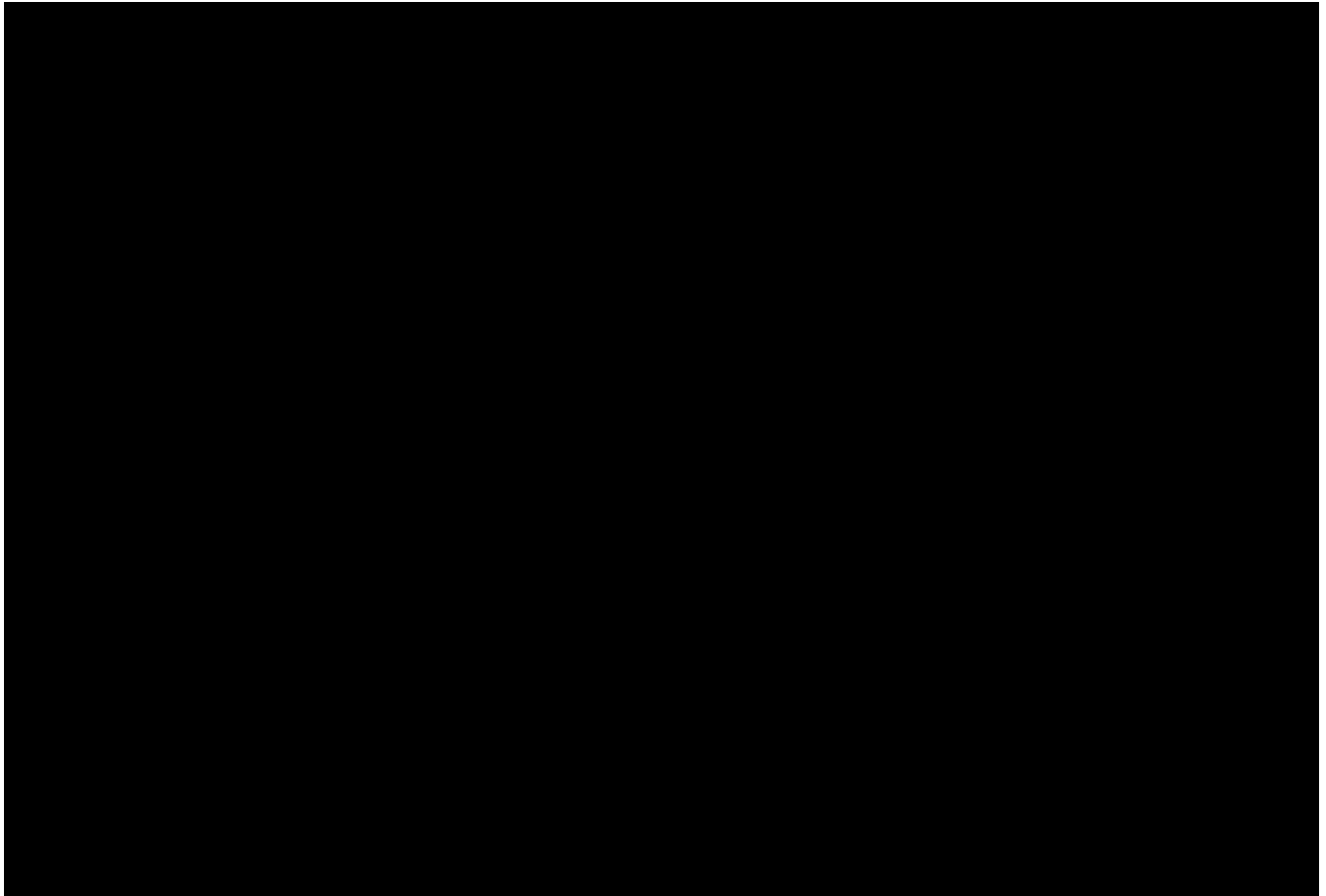
Source: Source: From Nielsen data, as provided by Fuse and discussed in the Declaration of Judi Lopez, which is included as an exhibit to Fuse’s Complaint.

Note: Median incomes shown in the table are averages for observations included in the Q12019 – Q32020 data set.

Figure 1

**Viewer Age Profile Comparison
Fuse vs. Turner Networks
12/30/2019 – 11/29/2020**

[[BEGIN CONFIDENTIAL]]



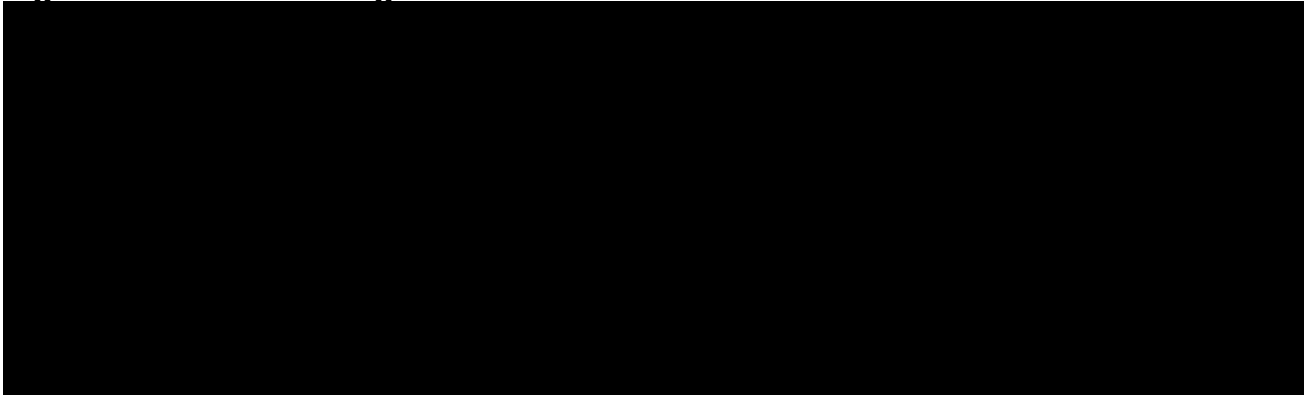
[[END CONFIDENTIAL]]

Source: From Nielsen data, as provided by Fuse and discussed in the Declaration of Judi Lopez, which is included as an exhibit to Fuse's Complaint.

Table 3

**Viewer Profile Comparison
Fuse Programs vs. Turner Networks
12/30/2019 – 11/29/2020**

[[BEGIN CONFIDENTIAL]]



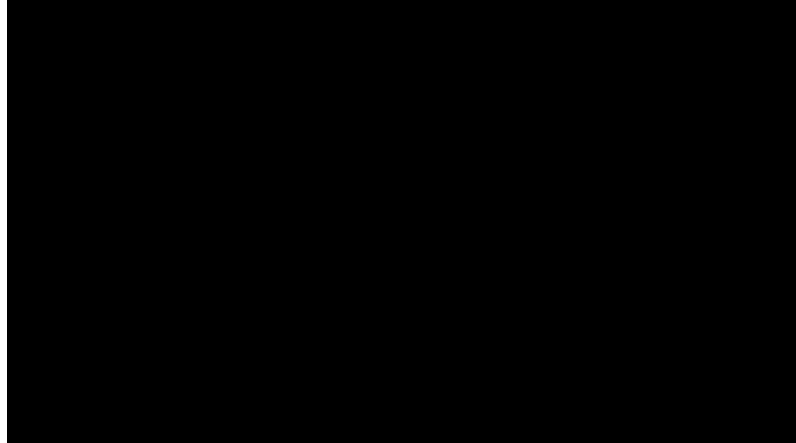
[[END CONFIDENTIAL]]

Source: From Nielsen data, as provided by Fuse and discussed in the Declaration of Judi Lopez, which is included as an exhibit to Fuse's Complaint.

Table 4

**Fuse Viewership Overlap with Turner Networks
2020**

[[BEGIN CONFIDENTIAL]]



[[END CONFIDENTIAL]]

Source: From Nielsen data, as provided by Fuse and discussed in the Declaration of Judi Lopez, which is included as an exhibit to Fuse's Complaint.

* * * *

The foregoing declaration has been prepared using facts of which we have personal knowledge or based upon information provided to us. We declare under penalty of perjury that the foregoing is true and correct to the best of our current information, knowledge and belief.

Executed on December 11, 2020



Coleman Bazelon
Principal
The Brattle Group



William P. Zarakas
Principal
The Brattle Group